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In The

Supreme Court of the United States

October Term, 1995

SPRING MEADOWS APARTMENT COMPLEX, LIMITED PARTNERSHIP,

Petitioner,

vs.

DAVID L. STALLINGS and BARBARA J. STALLINGS,

Respondents.

Petition for Writ of Certiorari to the Arizona Supreme Court

PETITION FOR WRIT OF CERTIORARI

RICK N. BRYSON
Counsel of Record
RICHARD A. KENT
MICHEL F. MILLS
TEILBORG, SANDERS & PARKS, P.C.
Attorneys for Petitioner
3030 North Third Street
Suite 1300
Phoenix, Arizona 85012
(602) 230-5600

9015
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

1. Is an action filed in violation of the 11 U.S.C. § 362(a) automatic bankruptcy stay void or voidable?

2. What is the proper standard for "cause" under 11 U.S.C. § 362(d) for granting retroactive annulment of the automatic bankruptcy stay so as to validate an action filed in violation of the stay?

3. What is the proper procedure for permitting a plaintiff to pursue his claims against a debtor in bankruptcy after plaintiff violates the stay by filing an action against the debtor without first seeking stay relief?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Petitioner Spring Meadows Apartment Complex Limited Partnership respectfully petitions this Court for a writ of certiorari to review the March 26, 1996 Opinion of the Arizona Supreme Court.

OPINIONS BELOW

The opinion of the Arizona Supreme Court is reported at 913 P.2d 496 and is reproduced in the accompanying Appendix at 1a. The June 16, 1994 decision of the Arizona Court of Appeals is reported at 180 Ariz. 617, 886 P.2d 1373 and reproduced at App. B, 12a. The unpublished decision of the Maricopa County Superior Court of the State of Arizona is reproduced at App. D, 33a.

STATEMENT OF JURISDICTION

The Arizona Supreme Court entered its Opinion on March 26, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTES INVOLVED

The pertinent portions of the automatic bankruptcy stay statute, 11 U.S.C. § 362(a) and (d), and 11 U.S.C. § 108(c) are reproduced at App. L, 84a and App. M, 86a.

STATEMENT OF THE CASE

A. Stallings' Violation Of The Stay.

On January 4, 1991, Petitioner Spring Meadows Apartment Complex Limited Partnership ("Spring Meadows") filed a petition for Chapter 11 in the Bankruptcy Court for the District of Arizona. Spring Meadows' bankruptcy filing automatically imposed a stay on the filing of any new or existing actions against Spring Meadows. *See* 11 U.S.C § 362.

On January 14, 1991, Respondents David L. and Barbara J. Stallings filed a tort action in Maricopa County, Arizona Superior Court against Spring Meadows for personal injuries sustained by Mr. Stallings on May 13, 1989. Stallings also filed an Amended Complaint in February 1994. Under both Arizona and Ninth Circuit law, Stallings' complaints, filed in violation of the stay, were acts void *ab inito*. *See Great Southwest Fire Ins. v. Triple "I" Ins. Co. Servs.*, 727 P.2d 336, 338-39, 151 Ariz. 283, 238-39 (1986); *In re Schwartz*, 954 F.2d 569, 572 (9th Cir. 1992).

There is no evidence that Spring Meadows attempted to conceal its bankruptcy filing from Stallings or that it filed the bankruptcy petition in bad faith.

To the contrary, Spring Meadows immediately notified Stallings of its bankruptcy when it was served with the complaints on February 26, 1994.

B. The 1991 Stay Lift Order.

On May 31, 1991, four and a half months after Stallings' violation of the bankruptcy stay and more than three months after Spring Meadows had notified Stallings of its bankruptcy, Stallings filed a "Motion for Relief from Stay" in the Bankruptcy Court for the District of Arizona. The Motion for Relief from Stay did not request retroactive relief or annulment of the stay, nor did it set forth any circumstances justifying such relief. On June 25, 1991, the bankruptcy court granted the Motion and entered Stallings' proposed order "lifting" the stay.

C. Dismissal Of Stallings' State Court Action And Stallings' Failure To Timely Refile It.

After the stay was lifted, Stallings requested that Spring Meadows answer the void complaint. In response, Spring Meadows filed a Motion to Dismiss Stallings' complaint because

it was a void act in violation of the automatic stay and should thus be dismissed. *See* App. E, 36a. Stallings responded that its violation of the § 362 stay was voidable, not void, and that the Motion to Dismiss should be denied. *See* App. F., 44a. The trial court granted Spring Meadows' Motion and dismissed Stallings' complaint in November 1991. *See* App. D, 35a.

Because Arizona's personal injury statute of limitation is two years, the statute of limitations as to Stallings' May 1989 injury had run by the time their January 1991 action was dismissed. However, 11 U.S.C. § 108(c) of the Bankruptcy Code provides that in the event a statute of limitation expires during the pendency of the bankruptcy stay, the claimant may refile the action within thirty days of the stay termination. Stallings failed to timely refile their action within this thirty-day period.

Instead of following the procedure expressly permitted by § 108(c), Stallings appealed to the Arizona Court of Appeals from the dismissal of Stallings' action. The parties' arguments on appeal again focused on the proper interpretation of the § 362(a) automatic bankruptcy stay, relief from the stay under § 362(d) and, as Spring Meadows argued, the effect of § 108(c). *See* App. H, 62a-67a and App. G, 59a-60a. The Arizona Court of Appeals followed Ninth Circuit and Arizona law recognizing that the filing of a complaint in violation of the stay is void, not voidable, and that the bankruptcy court's 1991 stay lift order granted prospective, not retroactive, relief. (886 P.2d at 1377-79). The court further followed federal law holding that "annulment" under § 362(d) constitutes the bankruptcy court's power to grant retroactive relief from the stay and is an extraordinary measure appropriate only in limited circumstances. *Id.* at 1378. On June 16, 1994, the Arizona Court of Appeals thus affirmed the dismissal of Stallings' January 1991 action because it was void and because the bankruptcy court's June 1991 stay lift order had not retroactively annulled the stay. Stallings' then filed their Petition for Review to the Arizona Supreme Court.

D. Stallings' 1994 Ex Parte Deposition Of Spring Meadows' Former Bankruptcy Counsel And Motion For Clarification/ Annulment.

After the Court of Appeals' decision was issued, Stallings resorted to a new strategy in an attempt to have the Arizona Supreme Court overturn the Court of Appeals' decision.

On August 19, 1994, three and one-half years after Stallings' violation of the stay and just three business days prior to the scheduled August 23, 1994 bankruptcy confirmation plan hearing, Stallings' bankruptcy counsel conducted the deposition of Spring Meadows' prior bankruptcy counsel during 1991, Jeff Greenberg. Stallings bankruptcy counsel gave one day notice of the deposition to attorney Greenberg and did not give any notice of it to Spring Meadows' state court defense counsel or Spring Meadows itself. At the deposition of attorney Greenberg, he immediately put Stallings' counsel on notice that he no longer represented Spring Meadows. Stallings' counsel nonetheless deposed attorney Greenberg regarding his understanding that the 1991 stay lift order was retroactive.

That same day, August 19, 1994, Stallings also filed a "Motion for Clarification, or, in the Alternative for Annulment of the Automatic Stay" seeking to either annul the automatic stay retroactive to Stallings' January 1991 complaint or clarify that the June 1991 stay lift order was retroactive. *See* App. O, 90a. Stallings attached to their Motion for Clarification/Annulment the deposition transcript of attorney Greenberg taken that same day. Stallings also filed a Motion to shorten the time for the hearing on the Motion for Clarification and set a hearing for August 23, 1994. *See* App. O, 90a.

Despite the extremely short notice, on August 22, 1994 Spring Meadow's state court defense counsel filed a Response in

opposition to Stallings' Motion for Clarification/Annulment.[1] *See* App. P, 100a. Spring Meadows' Response opposed the Motion for Clarification because: 1) Stallings had waived their right to seek retroactive annulment because they had waited three and one-half years to request it; 2) the bankruptcy court's 1991 bankruptcy order did not grant an annulment of the stay or other retroactive relief, nor did Stallings even request such relief; 3) Ninth Circuit law clearly provided that acts in violation of the stay are void, not voidable; 4) Stallings were not entitled to retroactive annulment because it is only to be granted in extreme circumstances, which do not exist here and which Stallings have not shown; 5) granting retroactive annulment would also be inappropriate because it would permit creditors to violate the stay with impunity; 6) Stallings failed both to timely refile their lawsuit and to avail themselves of 11 U.S.C. § 108(c), which expressly provides that if a statute of limitations runs during the time in which the bankruptcy stay is in effect, a new lawsuit can be filed within thirty days after the bankruptcy court terminates the stay; and 7) even with the dismissal of their January 1991 action, Stallings still had a remedy available to them in the form of a malpractice action against their tort counsel for failure to follow the proper procedures under §§ 362(d) and 108(c).

E. The December 6, 1994 Retroactive Annulment Order.

The bankruptcy court heard argument on Stallings' Motion for Clarification/Annulment on October 6, 1994 and granted it on December 6, 1994. The court held that the 1991 stay lift order was intended to be a retroactive annulment, despite its failure to use those terms, and also ordered an annulment of the automatic

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1. Given the extremely short notice Stallings provided to Spring Meadows' counsel regarding the August 23, 1994 hearing, Spring Meadows' counsel at that time was unable to file an application to appear as special counsel in connection with its Response, but later did prior to the October 6, 1994 hearing on Stallings' Motion.

stay retroactive to the filing of Stallings' January 14, 1991 personal injury complaint. *See* App. N, 87a. Stallings submitted a proposed order granting the Motion, which the bankruptcy court signed. A copy of the bankruptcy court's December 6, 1994 order and findings of fact was not sent to Spring Meadows' counsel, apparently because said counsel's amended application to appear as special counsel had not yet been ruled upon by the bankruptcy court. On January 11, 1995, after inadvertently learning of the bankruptcy court's December 6, 1994 order, Spring Meadows filed a precautionary notice of appeal from it, but then was forced to withdraw it as untimely. Spring Meadows then moved the bankruptcy under Rule 60 and Bankruptcy Rule 9024 to correct and re-enter the December 6, 1994 order, which the bankruptcy court denied.

F. Stallings' Use Of The Bankruptcy Court's December 6, 1994 Annulment Order In The Arizona Supreme Court And The Arizona Supreme Court's Opinion.

During the pendency of the Stallings' Petition for Review in the Arizona Supreme Court, Stallings successfully moved the Arizona Supreme Court to supplement the record with the bankruptcy court's December 6, 1994 Order retroactively annulling the stay and the bankruptcy court's denial of Spring Meadows' motion to correct the December 6, 1994 Order. Spring Meadows also asked the court to supplement the record with the pleadings showing that Spring Meadows was challenging the correctness of the December 6, 1994 order in the federal courts. In their briefs, both parties again vigorously argued the proper interpretation and applicability of the § 362(a) bankruptcy stay, the § 362(d) stay relief provision and § 108(c)'s savings provision permitting the actions barred by the statute of limitations to be filed within thirty days after stay relief is granted. *See* App. I, 69a and App. K, 75a.

At oral argument before the Arizona Supreme Court on May

11, 1996, Chief Justice Stanley Feldman stated his opinion that Arizona courts were not bound by the Ninth Circuit's or any other federal court's interpretation of federal bankruptcy law, other than the United States Supreme Court. *See* App. J, 73a.

On May 26, 1996, the Arizona Supreme Court reversed the dismissal of Stallings' January 1991 complaint. 913 P.2d 496. The court held that the Court of Appeals misinterpreted Ninth Circuit precedent because "whether Plaintiffs' original complaint was void or voidable" was irrelevant. The court thus ignored the void versus voidable issue and held that the threshold issue was whether the bankruptcy court actually granted retroactive relief so as to validate Stallings' complaint. *Id.* The court further held that the "annul" language of § 362(d) is not the only type of retroactive relief available under § 362(d) and that the bankruptcy court's June 1991 order was retroactive, even though it did not annul the stay. The court did not address what circumstances justified such retroactive relief. *Id.*

REASONS FOR GRANTING THE WRIT

I.

SUMMARY

The Arizona Supreme Court's erroneous interpretation of the Bankruptcy Code's § 362 automatic stay provision and § 108(c) savings provision results from absolute confusion among the courts regarding when, and under what circumstances, retroactive stay relief under § 362(d) is appropriate. This Court should grant certiorari to resolve the splits within both the state courts and federal circuit courts and between the state and federal courts by providing guidance as to what "cause" under 11 U.S.C. § 362(d) justifies retroactive annulment of the automatic stay so as to validate an action filed

in violation of the stay. Specifically, this Court should determine whether Congress intended that the proper remedy for an action filed in violation of § 362's stay is to grant retroactive annulment of the stay so as to validate the action or to permit the action to be refiled once stay relief is obtained.

The Bankruptcy Code automatically prohibits all acts to recover assets from a debtor's estate once the debtor files a bankruptcy petition. *See* 11 U.S.C. § 362(a). The automatic stay provides protection that is fundamental to debtor relief under the Code.

In 1978, Congress amended the Code by adding, among other things, §§ 362(d) and 108(c). Section 362(d) requires the bankruptcy court to grant relief, if requested, upon a showing of "cause." The court can grant relief by ordering at least one of four remedies: it can terminate, modify, condition or annul the stay. Only one remedy, however, permits the bankruptcy court to retroactively validate acts in violation of the stay: annulment. Section 108(c), in turn, permits a claimant to timely refile his action stayed by § 362 within thirty days after the stay terminates, even though the applicable statute of limitations has otherwise run.

Both the state and federal courts are split, however, regarding the validity of an action taken in violation of the stay and how to remedy such violations. Following long-standing United States Supreme Court precedent, the majority of circuits and state courts hold that stay violations are void *ab initio*. The leading cases in this regard hold that § 362's retroactive annulment power should only be used under compelling circumstances and that the claimant's proper remedy is to obtain stay relief and then refile their action, as permitted by § 108(c).

Other circuits, however, hold that stay violations are

voidable, not void, based on the 1978 addition of § 362(d) to the Bankruptcy Code. These courts explain that because § 362(d) permits the court to annul the stay retroactively, thereby validating any violations of it, no stay violation is ever truly "void." Thus, these courts hold that granting relief under § 362(d) is sufficient to permit an existing action filed in violation of the stay to proceed without having to be refiled.

The confusion thus involves not only the void versus voidable debate, but also what constitutes "cause" for granting retroactive relief under 11 U.S.C. § 362(d), which no court has clearly addressed. Additionally, no case distinguishes between the circumstances constituting cause for prospective versus retroactive relief under § 362(d). These are issues of enormous practical significance because of the frequency with which they arise in everyday practice and the inconsistent rules that courts are applying.

Petitioner Spring Meadows thus respectfully requests that this Court grant certiorari to resolve these important and unresolved issues of federal law.

II.

THE BANKRUPTCY CODE BALANCES THE INTERESTS OF DEBTORS AND CREDITORS BY IMPOSING AN AUTOMATIC STAY TO PROTECT THE DEBTOR FROM CREDITOR ACTIONS AND BY PERMITTING CREDITORS TO OBTAIN STAY RELIEF, SUBJECT TO THE NEED TO REFILE ACTIONS FILED IN VIOLATION OF THE STAY.

A. Section 362 Automatically Stays All Actions Against The Debtor Or The Debtor's Estate.

An automatic stay immediately arises when a debtor files a

bankruptcy petition. 11 U.S.C. § 362(a)(1994); *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 369, 108 S. Ct. 626, 629, 98 L. Ed. 740 (1987). The stay automatically freezes the debtor's financial status quo by precluding post-petition actions, including the "commencement . . . of a judicial . . . action" or the "enforcement . . . of a judgment." 11 U.S.C. § 362(a)(1)-(2); *Hillis Motors v. Hawaii Auto. Dealers' Ass'n (In re Hillis Motors)*, 997 F.2d 581, 585 (9th Cir. 1993). The Bankruptcy Code does not "burden the debtor with a duty to take additional steps to secure the benefit of the automatic stay." *In re Schwartz*, 954 F.2d 569, 572 (9th Cir. 1992); *In re Fugazy Express*, 982 F.2d 769, 776 (2nd Cir. 1992), *cert. denied*, 508 U.S. 952, 124 L. Ed. 2d 662, 113 S. Ct. 2445 (1993); *see Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1204 (3rd. Cir. 1991).

The protection provided by the automatic stay plays a "vital role in bankruptcy" and serves an "important and fundamental purpose." *Schwartz*, 954 F.2d at 571. The primary purpose of the stay is that it shields the debtor while he regains his "financial footing." *Grogan v. Garner*, 498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991) (noting that Congress intended the Bankruptcy Code to give debtors a reasonable opportunity to make a fresh start); *Constitution Bank v. Tubbs*, 68 F.3d 685, 691 (3rd Cir. 1995); *Schwartz*, 954 F.2d at 571. As Congress stated in the Historical Notes to § 362:

> The automatic stay is one of the fundamental debtor protections provided in the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or organization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 340 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5963, 6296-97. The second purpose of the stay is to protect creditors by forcing all claims against the debtor into a single, organized proceeding. *See Hillis Motors*, 997 F.2d at 585.

Spring Meadows filed a bankruptcy petition on January 4, 1991. By operation of law, a bankruptcy stay went into immediate effect on that date. *See* 11 U.S.C. § 362. Spring Meadows, therefore, became entitled to receive the full benefit of the automatic stay, including protection against lawsuits being brought against it.

B. In *Kalb*, This Court Held That Actions Taken In Violation Of The Stay Are Void And Without Effect.

Prior to the enactment of the current Bankruptcy Code, this Court held that actions taken in violation of the stay are "not merely erroneous but beyond" the state court's power. *Kalb v. Feuerstein*, 308 U.S. 433, 438, 60 S. Ct. 343, 84 L. Ed. 370 (1940). Interpreting language similar to subsequently enacted § 362, this Court held that the filing of a bankruptcy petition, pursuant to § 75, operated *ipso facto* as a stay on the power of a state court. *Id.* at 438, 440. Therefore, a state court's action, taken in violation of the bankruptcy stay, is void, and subject to collateral attack. *Id.*

C. In 1978, Congress Expanded Creditors' Rights To Obtain Retroactive Stay Relief, But Did Not Indicate What Circumstances Justify Such Relief.

1. *Section 362(d) Gives The Bankruptcy Court The Authority To Grant Both Prospective And Retroactive Relief From The Automatic Stay.*

In 1978, Congress enacted §§ 362(d) and 108(c) as tools

permitting creditors to avoid harsh and unintended results caused by the automatic stay, while still maintaining the viability of the stay. *See* Bankruptcy Reform Act, Pub. L. 95-598, 92 Stat. 2549; *Easley v. Pettibone Mich. Corp.*, 990 F.2d 905, 911 n. 4 (6th Cir. 1993) (discussing the historical development of the court's annulment power); *see also infra* Part II. C, discussing statute of limitations relief pursuant to 11 U.S.C. § 108(c). In terms of stay relief, Congress generally maintained the Code in the form it existed when the Court had decided *Kalb*, 308 U.S. at 438-40. The Bankruptcy Act that *Kalb* interpreted permitted Bankruptcy referees to modify or terminate the automatic stay, but did not permit the courts to retroactively annul the automatic stay. *See* 11 U.S.C. § 362(d) (Supp. III 1979); *Easley*, 990 F.2d at 911.

The 1978 Bankruptcy Reform Act both continued and expanded bankruptcy courts' authority to grant relief from the stay by enacting § 362(d). The Act added § 362(d) that permits the bankruptcy court, upon "cause," to grant at least four different types of relief from the automatic stay. The court may terminate, annul, modify or condition the stay. 11 U.S.C. § 362(d); 2 Collier on Bankruptcy § 362.07; John Francis Murphy, *The Automatic Stay in Bankruptcy*, 34 Cleve. St. L. Rev. 567, 595-96 (1986). These options give the bankruptcy court "wide latitude" in crafting relief from the automatic stay. *Mataya v. Kissinger (In re Kissinger)*, 72 F.3d 107, 108 (9th Cir. 1995); *In re Albany Partners Ltd.*, 749 F.2d 670, 675 (11th Cir. 1984); *Sikes v. Global Marine, Inc.*, 881 F.2d 176, 179 (5th Cir. 1989). This latitude includes the power to grant prospective and retroactive relief from the stay. *Kissinger*, 72 F.3d at 108-09 (quoting *Schwartz*, 954 F.2d at 572); *Sikes*, 881 F.2d at 178-79; Collier on Bankruptcy, § 362.07; Murphy, *The Automatic Stay in Bankruptcy* at 596-97.

Section 362(d) permits the court to grant prospective relief by terminating, modifying or conditioning the stay. *See* 11

U.S.C. 362(d). An order terminating the stay provides creditors with prospective relief from the automatic stay from the date of the order's entry. *Ellis v. Consolidated Diesel Elec. Corp.*, 894 F.2d 371, 373 (10th Cir. 1990); *Sikes v. Global Marine, Inc.*, 881 F.2d 176, 179 (5th Cir. 1989), *reh'g denied en banc*, 888 F.2d 1388 (5th Cir. 1989), 881 F.2d at 179 (citing 2 Collier's Bankruptcy Manual, § 362.06 (3rd Ed. 1983)); Murphy, *The Automatic Stay in Bankruptcy*, at 596. A "modification" of the stay cancels the stay as to one entity or act while maintaining the debtor's "breathing spell" from the remainder of his creditors. Murphy, *The Automatic Stay in Bankruptcy*, at 596. A "conditioning" of the stay generally preserves the full effect of the stay as of the time of the order granting relief, but is subject to automatic "modification" upon the occurrence of some future triggering act or omission. *Id.*; *Sikes*, 881 F.2d at 178-79. Therefore, a "termination," "modification" or "conditioning" of the stay is effective only upon entry of the order granting such relief. The "lifting" of a stay thus validates only later judicial proceedings, not prior ones. *Ellis*, 894 F.2d at 373; *In re Albany*, 749 F.2d at 675.

Section 362(d) also permits the bankruptcy court to grant retroactive relief by annulling the automatic stay. *See* 11 U.S.C. § 362(d). An order annulling the stay can operate retroactively to the date of the filing of the petition that gave rise to the stay. *See Kissinger*, 72 F.3d at 108; *Siciliano*, 13 F.3d at 750-52; *Schwartz*, 954 F.2d at 572; *Sikes*, 881 F.2d at 179. "Of the four means of granting relief from the automatic stay, *only annulment reaches back in time to reverse the prior effect of the stay*." Murphy, *The Automatic Stay in Bankruptcy* at 579 (emphasis added); *see also Siciliano*, 13 F.3d at 750-52; *Schwartz*, 954 F.2d at 572; *Sikes*, 881 F.2d at 179; *In re Albany*, 749 F.2d at 675.

2. *Section 362(d) Does Not Indicate What "Cause" Is Sufficient For Prospective, Versus Retroactive, Relief.*

In enacting § 362(d), Congress failed to define the

circumstances in which stay relief is appropriate. *See Trident Assoc. Ltd. Partnership v. Metropolitan Life Insurance Co. (In re Trident Assoc. Ltd. Partnership)*, 52 F.3d 127, 131 (6th Cir. 1995), *reh'g en banc denied*, 1995 U.S. App. LEXIS, 14732, *cert. denied*, 133125, 116 S. Ct. 188 (1995); *Claughton v. Mixson*, 33 F.3d 4, 5 (4th Cir. 1994). Nor did Congress specify when retroactive stay relief was appropriate. The only standard for stay relief under § 362(d) is its generic "cause" standard applicable to all types of § 362(d) relief.

Nor has Congress provided any further guidance on this issue in subsequent statutory amendments. In 1994, Congress enacted the most comprehensive amendments to § 362(d) since its original enactment in 1978. *See* 11 U.S.C. 362(d) (as amended Pub. L.103-394, § 218 (b), Oct.22 1994, 108 Stat. 4107, 4119, 4122, 4128, 4132, 4141, 4142, 4144). In so doing, Congress failed to provide any guidance on this important issue, apparently leaving it to the judiciary to determine what constitutes "cause" for each type of stay relief. As will be discussed *infra*, the courts' interpretation of the "cause" standard is either nonexistent or hopelessly confused.

D. In 1978 Congress Also Balanced The Interests Of Debtors And Creditors As To The Expiration Of Applicable Statutes Of Limitation During The Pendency Of The Automatic Stay By Enacting § 108(c).

Understanding the impact that a delay could have on a creditor's action in light of applicable statutes of limitation, Congress also provided creditors with a thirty-day window to refile their actions that would normally be time barred. *See* 11 U.S.C. § 108(c). Enacted at the same time as § 362(d), § 108(c) provides in pertinent part:

> . . . [I]f applicable nonbankruptcy law [or] an order entered in a nonbankruptcy proceeding

> . . . fixes a period for commencing or continuing a civil action in a [non-bankruptcy] court . . . on a claim against the debtor. . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of —
>
> * * *
>
> (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301. . . .

The Historical Notes show that Congress intended § 108(c) to work hand-in-glove with § 362(d).

> Subsection (c) extends the statute of limitations for creditors. Thus if a creditor is stayed from commencing or continuing an action against the debtor because of the bankruptcy case, then the creditor is permitted an additional 30 days after the event by which the stay is terminated, whether that event be relief from the automatic stay under proposed 11 U.S.C 362 . . .

Sen. Rep. No. 95-989, 95th Cong., 1st Sess. 340 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News. This cross-reference to § 362(d), and Congress' simultaneous enactment of §§ 108(c) and 362(d) illustrate that § 108(c)'s right to refile was intended as the mechanism to cure any harm the creditor might suffer as a result of the stay. *See Easley*, 990 F.2d at 912.

The Sixth Circuit's ruling in *Easley v. Pettibone*, 990 F.2d at 912, illustrates the intended application of § 108(c) when a claimant brought an action in violation of the stay and then failed to refile it.

> Although plaintiffs will be prejudiced because they have lost their products liability case against defendant, this is because they failed to refile their action within the 30 day grace period afforded by 11 U.S.C. 108(c). Accordingly, the . . . complaint filed against defendant is voided. The District Court erred in denying defendant's Motion to Dismiss because Plaintiffs failed to refile their claim within thirty days of the lifting of the automatic stay and the statute of limitations for such actions expired. . . .

990 F.2d at 913; *but see Pettibone Corp. v. Easley*, 935 F.2d 120, 121 (7th Cir. 1991) (noting that, while § 108(c)(2) provides a minimum 30 day refiling period, issue of whether an act done in violation of the stay is a "non-event for limitations purposes is a question of state law").

III.

THE ARIZONA SUPREME COURT'S ERROR RESULTS FROM CONFUSION REGARDING WHEN RETROACTIVE RELIEF AS TO A VIOLATION OF THE AUTOMATIC STAY IS APPROPRIATE.

The Arizona Supreme Court erred when it permitted the Stallings' state tort action filed in violation of the stay to proceed as if no stay violation had occurred. 913 P.2d at 499. The Arizona Supreme Court's error reflects the fact that both the federal and

state courts are fundamentally split on this issue. First, the Stallings court completely failed to even address whether the January 1991 complaint was void or voidable. The Arizona Supreme Court also erred when it held that retroactive relief should not be limited to an annulment of the stay and should be freely granted. *Id.* This interpretation completely contradicts the one issue most circuits agree on: retroactive relief is an extraordinary measure and should be used only in extreme circumstances. The Stallings courts' error resulted from confusion within the federal and state courts. This confusion within the courts stems from the evolution of stay relief discussed above and the absence of any pronouncement by this Court interpreting § 362(d)'s "cause" requirement for retroactive relief and explaining the procedure to be followed when an action is filed in violation of the stay.

A. The Majority Of Circuits Hold That Violations Of The Stay Are Void.

The First, Second, Third, Fourth, Seventh, Ninth, Tenth and Eleventh Circuits hold that violations of the automatic stay are void *ab initio*. *In re Smith Corset Shops*, 696 F.2d 971, 976-77 (1st Cir. 1982); *Rexnord Holdings v. Bidermann*, 21 F.3d 522, 527 (2nd Cir. 1994); *Constitution Bank v. Tubbs*, 68 F.3d 685, 692 n.6 (3rd Cir. 1995); *In re Knightsbridge Dev. Co.*, 884 F.2d 145, 149, (4th Cir. 1989); *Matthews v. Rosene*, 739 F.2d 249, 251 (7th Cir. 1984); *Schwartz v. United States (In re Schwartz)*, 954 F.2d 569, 572-72, (9th Cir. 1992); *Ellis v. Consolidated Diesel Elec. Corp.*, 894 F.2d 371, 372 (10th Cir. 1990); *Franklin Sav. Ass'n v. Office of Thrift Supervision*, 31 F.3d 1020, 1022 (10th Cir. 1994); *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1308 (11th Cir. 1982). These circuits generally follow this Court's 1940 decision in *Kalb v. Feuerstein*, 308 U.S. 433, 438, 60 S. Ct. 343, 345, 84 L. Ed. 370 (1940) that any violation of the bankruptcy stay, including a judicial act, is void and without

effect. *See, e.g. Franklin*, 31 F.3d at 1022; *Maritime Elec.*, 959 F.2d at 1206; *Schwartz*, 954 F.2d at 571.

These courts hold that actions violating the stay are void because Congress intended the stay to shield the debtor from claims not presented in the bankruptcy forum. *See Schwartz*, 954 F.2d at 571.

> If the violations are merely voidable, debtors must spend a considerable amount of time and money policing and litigating creditor actions. . . . Nothing in the Code or the legislative history suggests that Congress intended to burden a bankruptcy debtor with an obligation to fight off unlawful claims.

Id. Stay violations defeat the peace of mind that Congress intended the Code to provide. Moreover, the stay cannot serve its intended purpose if courts can arbitrarily or easily retroactively validate actions commenced during the stay. *See Schwartz*, 954 F.2d at 572.

B. The Minority Of Circuits Hold That Violations Of The Stay Are Voidable.

The Fifth, Sixth and Federal Circuits hold that actions taken in violation of the stay are either "voidable" or invalid. *See Jones v. Garcia (In Re Jones)*, 63 F.3d 411, 412 (5th Cir. 1995), *reh'g denied*, 1995 U.S. App. LEXIS 33,213, *cert. denied*, 134 L. Ed. 2d 666, 116 S. Ct. 1566 (1966); *Sikes v. Global Marine, Inc.*, 881 F.2d 176, 178-80 (5th Cir. 1989), *reh'g denied en banc*, 888 F.2d 1388 (5th Cir. 1989); *Easley v. Pettibone Mich. Corp.*, 990 F.2d 905, 910 (6th Cir. 1993) (holding that stay violations are invalid and become voided absent an order granting annulment); *Bronson v. United States (In re Bronson)*, 46 F.3d 1573, 1578 (Fed. Cir. 1995) (holding that stay violations are invalid, but not void). These jurisdictions find acts in violation of the stay to be

voidable or invalid because § 362(d) gives the court the authority to retroactively validate any act taken in violation of the stay by annulling the stay. *See Bronson*, 46 F.3d at 1578-79; *Sikes*, 881 F.2d at 179.

The courts in this minority generally follow the Fifth Circuit's holding in *Sikes v. Global Marine, Inc.*, 881 F.2d at 178-80. *See Jones*, 63 F.3d at 412; *Bronson*, 46 F.3d at 1578; *Easley*, 990 F.2d at 909. In *Sikes*, plaintiffs/creditors appealed the dismissal of their personal injury complaint filed more than one month after the debtor filed a Chapter 11 bankruptcy petition. 881 F.2d at 177. The Fifth Circuit framed the threshold issue as whether the complaint, filed in violation of the automatic stay, was void or voidable. *Id.* at 178. The court noted that each remedy listed in § 362(d) provides a different type of relief and that the authority to annul the stay permits the court to grant retroactive relief. *Id.* at 178-79 (quoting *In re Albany Partners, Ltd.*, 749 F.2d 670 (11th Cir. 1984)). The Fifth Circuit held that the unique relief granted by an annulment precludes a finding that acts filed in violation of the stay are void. *Id.* at 179 (explaining that a void rule would render § 362(d)'s different provisions meaningless). The court explained that an act "that is void is nugatory and of no effect and cannot be cured," while a voidable act may be either cured or voided. *Id.* The court thus concluded that acts filed in violation of the stay must be voidable because § 362(d) annulment permits retroactive stay relief as to such violations. The court justified its failure to follow the *Kalb* "void" rule on the grounds that § 362(d) added the power to grant retroactive relief that did not exist at the time *Kalb* was decided. *Id.* at 179, n. 2.

C. State Courts Disagree With Both Federal Courts And Other State Courts As To The Proper Rule.

Some state courts hold that actions taken in violation of the stay are void. *See, e.g., Thomas v. Miller*, 906 S.W.2d 260, 262

(App. Tex. Texarkana 1995) (holding that § 362(a) nullifies actions in violation of the stay); *Audio Data Corporation v. Monus*, 789 S.W.2d 281, 285 (App. Tex. 1990) (holding that stay violation was void and not cured by bankruptcy court's order terminating the stay); *Benjamin v. Chamberlin*, 824 P.2d 356, 357, 113 N.M. 216, 217 (Ct. App. 1991); *Price v. Cole*, 574 N.E. 2d 403, 405-06, 31 Mass. App. Ct. 1, 4-5 (App. 1991). Other states find stay violations are merely voidable. *Tim Wargo & Sons, Inc. v. Equitable Life Assurance Soc.*, 809 S.W.2d 375, 378, 34 Ark. App. 216, 221 (1991). Finally, other states, such as Arizona, follow a different rule altogether. *See Stallings v. Spring Meadows Apartment Complex Ltd. Partnership*, 913 P.2d 496, 499 (Ariz. 1996) (holding that whether a stay violation is void or voidable is irrelevant if retroactive relief is granted and that retroactive relief is appropriate without any special circumstances). The state courts thus also interpret § 362(d) inconsistently with one another and with the federal courts.

The inconsistency in the rules followed by both the federal and state courts as to whether stay violations are void, voidable or invalid make clear that this conflict cannot be resolved short of this Court's intervention. First, as illustrated by this very case, some state courts have adopted a rule different than that followed by the federal circuit court in that geographical area. Here, though the Arizona Supreme Court claimed to apply the Ninth Circuit rule, it in fact did not, as will be discussed later. The lack of a clear rule has even created intra-circuit confusion with inconsistent results within a circuit. *See In re Williams*, 124 Bankr. 311, 316-18 (Bankr. C.D. Cal. 1991) (criticizing Ninth Circuit Bankruptcy Appellate Panel for failing to follow the Ninth Circuit law that stay violations are void). If this inconsistency is the rules being applied by federal versus state courts within the same geographical area is to ever end, it will be up to this Court to do so.

Moreover, several state courts have made it clear that the inconsistent rules between the state and federal courts will continue without the United States Supreme Court's resolving this controversy. The Texas decision in *Thomas v. Miller*, 906 S.W.2d at 262 (Tex. App. 1995) illustrates this point. The *Thomas* court analyzed the split in the federal circuits and then refused to follow any federal common law interpreting the automatic stay. *See Thomas*, 906 S.W.2d at 262. The court explained that "even if the circuit courts agreed on a proper interpretation of the stay provision of the Bankruptcy Code, the opinions of those federal courts are persuasive — not binding." Similarly here, the Chief Justice of the Arizona Supreme Court made a nearly identical statement at the oral argument in this case. *See* App. J, 73a.

Thus, absent resolution by this Court, the confusion in both the state and federal courts will continue to cause inconsistent and unfair results. This Court should thus grant certiorari to resolve this conflict.

IV.

NO CLEAR RULE EXISTS AS TO WHAT CONSTITUTES "CAUSE" UNDER § 362(d)(1) JUSTIFYING RETROACTIVE STAY RELIEF.

In addition to the "void versus voidable" issue, this Court should also grant certiorari to provide guidance as to what constitutes § 362(d) "cause" justifiying retroactive stay relief.

A. Neither The Code Nor Its Legislative History Defines "Cause" For Purposes Of Obtaining § 362(d) Stay Relief.

Section 362(d)(1) provides that the bankruptcy court can grant relief from the automatic stay "for cause," yet does not define what circumstances constitute "cause." *Trident Assocs.*

Ltd. Partnership v. Metropolitan Life Insurance Co., 52 F.3d 127, 131 (6th Cir. 1995), *reh'g en banc denied*, 1995 U.S. App. LEXIS 14,732, *cert. denied*, 133125, 116 S. Ct. 188 (1995); *Claughton v. Mixson*, 33 F.3d 4, 5 (4th Cir. 1994); *Santa Clara Cty. Fair Ass'n. v. Garcia (In re Santa Clara Cty.)*, 180 Bankr. 564, 566-67 (Bankr. 9th Cir. Cal. 1995). Congress provided limited guidance in the Historical Notes as to § 362(d)'s cause requirement applicable to all the types of relief available under § 362(d):

> Section (d) requires the court, on request of a party in interest, to grant relief from the stay, for cause. The lack of adequate protection of an interest in property of the party requesting relief from the stay is one cause for relief, but is not the only cause. As noted above, a desire to permit an action to proceed to completion in another tribunal may provide another cause. Another cause might include the lack of any connection with or interference with the pending bankruptcy case. [Examples discussing divorce or child custody, probate, and fiduciary activities are omitted] . . . The facts of each request will determine whether relief is appropriate under the circumstances.

H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 340 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5963, 6296-97. This lack of direction requires courts to determine when stay relief is appropriate on a case by case basis without any consistent rule of law to serve as a guideline.

B. The Circuits Which Have Addressed The Issue Hold That Retroactive Relief Should Be Used Sparingly, But Fail To Explain What Circumstances Justify Its Use.

The circuits generally agree that retroactive relief is a narrow, equitable exception to the bankruptcy stay that applies in limited circumstances. *See Mataya v. In re Kissinger*, 72 F.3d 107, 109 (9th Cir. 1995); *Franklin Sav. Ass'n v. Office of Thrift Supervision*, 31 F.3d 1020, 1023 (10th Cir. 1994); *Easley v. Pettibone Mich. Corp.*, 990 F.2d 905, 911 (6th Cir. 1993); *Smith v. First American Bank N.A. (In re Smith)*, 876 F.2d 524, 527 (6th Cir. 1989); *In re Calder*, 907 F.2d 953, 956 (10th Cir. 1990); *In re Albany Partners, Ltd.*, 749 F.2d 670, 675 (11th Cir. 1984); *Matthews v. Rosene*, 739 F.2d 249, 251 (7th Cir. 1984); *In re SmithCorset Shops*, 696 F.2d 971, 976-77 (1st Cir. 1982). "The important congressional policy behind the automatic stay demands that the courts be especially hesitant to validate acts committed during the pendency of the stay." *In re Albany Partners*, 749 F.2d at 675. This is consistent with the general principle that judicial restraint is particularly important as to any retroactive form of judicial relief. *See, e.g., Chevron Oil Co. v. Huson*, 404 U.S. 97, 105-109, 92 S. Ct. 349, 354-56, 30 L. Ed. 2d 296 (1971) (regarding the test for retro-active application of a new law).

Despite general agreement as to the limited use of retroactive stay relief, however, no test defines the circumstances constituting "cause" to justify such relief. The Ninth Circuit, for example, limits retroactive stay relief to "extreme circumstances," but does not define them. *Kissinger*, 72 F.3d at 109; *Shamblin*, 890 F.2d at 125-26; *In re Murray*, 193 Bankr. 20, 1996 Bankr. LEXIS 223, **4, 9 (Bankr. E.D. Cal. 1996); (noting that the Ninth Circuit has not articulated a standard defining what constitutes "extraordinary circumstances.")

Courts which have granted retroactive annulment generally do so as an "equitable exception" to the operation of the stay in circumstances involving fraud, bad faith conduct by the debtor or the debtor's concealment of the stay. *See Easley*, 990 F.2d at 910-11; *In re Calder*, 907 F.2d at 956-57 (finding cause where creditor used automatic stay as a "trump card after an unfavorable result was reached in state court"); *Rosene*, 739 F.2d at 251 (finding cause where the debtor unreasonably and inexcusably failed to nullify a three-year-old state order granted in the creditor's favor); *Smith Corset,*, 696 F.2d at 977 (finding cause where the debtor remained "stealthily silent" to use the automatic stay to void the creditor's claim). These circuits thus retroactively validate stay violations when the debtor unreasonably withholds notice of the bankruptcy and attempts to use the automatic stay to invalidate the creditor's claim. The Arizona Supreme Court in *Stallings*, as well as the bankruptcy court order on which it relied, completely failed to consider what circumstances justified retroactive stay relief.

This Court should thus grant certiorari to provide guidance as to what constitutes § 362(d) "cause" justifying retroactive stay relief.

V.

THE ARIZONA SUPREME COURT'S INTERPRETATION OF § 362(d) CONTRADICTS OTHER FEDERAL AND STATE DECISIONS.

As demonstrated above, this Court should grant certiorari because both federal and state cases interpreting "annulment" and "cause" under § 362, as well as § 108(c), are hopelessly confused. Moreover, the Arizona Supreme Court's *Stallings* decision is the appropriate case in which to clarify the rules regarding stay violations and retroactive stay relief because that

case not only exemplifies the confusion, but actually compounds it.

A. The *Stallings* Court Contradicted Federal Circuit Cases As To Whether Violations Of The Stay Are Void Or Voidable.

Amazingly, the *Stallings* Court bypassed the void versus voidable issue and immediately jumped to the retroactive relief issue. (913 P.2d at 499). In so doing, the court ignored what all cases recognize is the first step in the analysis — Is the stay violation void and without effect or a voidable or invalid act that can be cured? Whatever the correct rule in this regard may be, it should be applied consistently.

B. The *Stallings* Court Misconstrued § 362(d) And Rejected Federal Circuits Holding That Retroactive Relief Is Available Only In Exceptional Circumstances.

In *Stallings*, the Arizona Supreme Court rejected the prospective/retroactive dichotomy acknowledged by all federal courts and commentators and the judicial restraint required when exercising retroactive relief. (913 P.2d at 499). The court ignored the distinction between the different remedies available under § 362(d) and appeared to hold that retroactive relief is available as each type of remedy. *Id.* Yet federal courts generally agree on at least one point: Congress identified at least four different remedies, and only "annulment" applies retroactively. *See supra* Part II.C.

The Arizona Supreme Court in *Stallings* criticized the Arizona Court of Appeals for interpreting annulment too narrowly. *Id.* However, the Court of Appeals simply followed the weight of federal authority by holding:

> Annulment of a stay is an extraordinary measure and is appropriate only in limited

> circumstances. *In re Shamblin*, 890 F.2d 123, 126 (9th Cir. 1989) . . . *In re Jewett*, 146 B.R. 250, 252 (Bankr. 9th Cir. 1992). . . . Ordinarily, courts annul a stay only where the debtor filed the bankruptcy petition in bad faith or engaged in some form of misconduct. *See, e.g., Shamblin*, 890 F.2d at 126 (finding stay had not been annulled where order of bankruptcy court was unclear and equities favored debtors); *Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421, 1425 (9th Cir. 1985) . . . *See also In re Albany Partners, Ltd.*, 749 F.2d 670, 675 (11th cir. 1984); 2 Collier on bankruptcy § 362.11 at 362-85 (15th Ed. 1994). . . .

Stallings v. Spring Meadows Apartment Complex Ltd. Partnership, 886 P.2d 1373, 1378, 180 Ariz. 617, 622 (Ariz. App. 1994), *vacated and remanded*, 913 P.2d 496 (1996).

The Arizona Supreme Court justified its theory for a broad application of retroactive relief based on faulty logic:

> If Congress had meant that a bankruptcy court can only grant retroactive relief from the automatic stay if it "annuls" the stay, it would have said so.

Id. The Court based this conclusion on legislative history noting that "the bankruptcy court has broad discretion in granting relief." *Id.* (citing 11 U.S.C. § 362, Revision Notes, and Legislative reports 1978 Acts and *In re Jewett*, 146 B.R. 250, 251 (Bankr. 9th Cir. 1992)). While it is true that the bankruptcy court has broad discretion in fashioning stay relief, that does not mean that all stay relief should be retroactive, nor that the court's

exercise of discretion in granting stay relief is to be applied in the absence of a standard. Nor does it require that the "cause" sufficient to justify retroactive, versus prospective, relief is the same. The *Stallings* decision thus contradicts both § 362(d) and federal cases interpreting it.

At one time, the Arizona Supreme Court supported and upheld the fundamental protections Congress provided by enacting the automatic stay. *See Great Southwest Fire Ins. Co. v. Triple "I" Ins. Servs.*, 727 P.2d 336, 338-39, 151 Ariz. 283, 238-39 (1986). In that case, the Arizona Supreme Court invalidated a state court judgment signed in violation of the automatic stay. *Id.* Appropriately, the Court held:

> To uphold a state court judgment which was entered in violation of the Bankruptcy Code violates the purpose of the supremacy clause and the national policy contained in the federal act. We hold that a judgment entered in violation of the automatic stay provisions of the Bankruptcy Code is void as to the debtor in bankruptcy.

Id. at 339, 151 Ariz. at 286.

Unlike the Arizona Supreme Court's recent *Stallings* decision, at one point Arizona clearly understood the federal purpose behind the Bankruptcy Code and the automatic stay. The confusion in the law in this regard due to the lack of a clear rule thus exists not only between the circuits, between the federal and the state courts, within a particular circuit and between the state courts, but also within the Arizona Supreme Court itself.

C. The *Stalling* Court Ignores And Contradicts The Purpose And Intent Of 11 U.S.C. § 108(c).

In addition, the *Stallings* decision is completely contrary to

the holding in *Easley v. Pettibone Mich. Corp.*, 990 F.2d 905, 913 (6th Cir. 1993), discussed *supra,* that required the plaintiff to refile the complaint filed in violation of § 362's stay. The *Easley* Court realized that Congress had provided a remedy to plaintiffs who filed an action in violation of the stay in order to avoid a harsh result — that is, refile the action as provided by 11 U.S.C. 108(c). *Id.* Thus, *Stallings* directly contradicts other federal courts' holdings that the creditor should not be permitted to manipulate § 362(d)'s remedies and ignore § 108(c)'s protection in order to correct the creditor's own error.

Petitioner Spring Meadows submits that *Easley* provides the proper resolution of the issue in this case. The correct way to avoid a forfeiture by plaintiffs who have filed an action, perhaps inadvertently in violation of the stay is not to violate the "fundamental" and "vital" purpose of the § 362 stay, but rather to permit the relief Congress has already provided. That is, absent bad faith conduct by the debtor, a violation of the stay should not be treated the same as a non-violation by the court granting extraordinary retroactive annulment to validate the stay violation. To treat an action filed in violation of the stay the same as an action filed after stay relief is obtained merely encourages stay violations. Instead, courts should require that the action filed in violation of the stay be dismissed as void and permit the claimant to simply refile his claim, as permitted by § 108(c). Such a rule does not place an undue burden on the creditor, provides an equitable result for both debtor and creditor and respects Congressional intent.

CONCLUSION

This Court should grant certiorari to define debtors' and creditors' rights as to retroactive annulment of the Bankruptcy Code's automatic stay. The framework for this rule already exists. This Court has already held that acts in violation of the stay are void. *Kalb v. Feuerstein*, 308 U.S. 433, 438, 60 S. Ct.

343, 84 L. Ed. 370 (1940). This basic principle remains unchanged by Congress' grant of § 362(d) authority to annul the stay. Additionally, Congress also provided a remedy in § 108(c) for those creditors whose cause of action expires during the automatic stay — refile the action within thirty days from the date the stay ends. The above factors support the conclusion that the appropriate remedy when an action is filed in violation of the stay is not to grant extraordinary retroactive relief, but to permit the action to be refiled. Such an approach both respects the "vital" and "fundamental" purpose of the stay and prevents claimants from losing their cause of action.

Moreover, the proper procedure for handling actions filed in violation of the stay has erroneous practical significance. Debtors, creditors, practitioners and courts confront such situations on a frequent basis, only to find the law hopelessly confused.

For all the above reasons, this Court should grant certiorari to resolve these unresolved and frequently encountered issues.

Respectfully submitted,

RICK N. BRYSON
Counsel of Record
RICHARD A. KENT
MICHEL MILLS
TEILBROG, SANDERS & PARKS, P.C.
Attorneys for Petitioner
3030 North third Street
Suite 1300
Phoenix, Arizona 85012
(602) 230-5600

APPENDIX A — OPINION OF THE ARIZONA SUPREME COURT FILED MARCH 26, 1996

IN THE SUPREME COURT OF ARIZONA
En Banc

Supreme Court
CV-94-0355-PR

Court of Appeals
1 CA-CV 92-0117

Maricopa County
CV 91-00953

DAVID L. STALLINGS and BARBARA J. STALLINGS, husband and wife,

Plaintiffs-Appellants,

v.

THE SPRING MEADOWS APARTMENT COMPLEX LIMITED PARTNERSHIP, an Arizona Limited Partnership,

Defendant-Appellee.

OPINION

Appeal from the Superior Court of Maricopa County

The Honorable Alfred J. Rogers, Judge

REVERSED AND REMAND

Appendix A

Arizona Court of Appeals, Division One
180 Ariz. 617, 886 P.2d 1373 (App. 1994)

VACATED

Bryan Cave — Phoenix
by Mark I. Harrison
Steven G. Montoya
and
Goldberg & Osborne — Tucson
by John E. Osborne
Attorneys for Plaintiffs-Appellants Stallings

Teilborg, Sanders & Parks, P.C. — Phoenix
by Richard A. Kent
Rick N. Bryson
Bruce C. Smith
Attorneys for Defendant-Appellee

CORCORAN, Justice (Retired)

David Stallings and Barbara Stallings (plaintiffs) appealed the trial court's grant of summary judgment for defendant, The Spring Meadows Apartment Complex Limited Partnership (Spring Meadows). The court of appeals affirmed the summary judgment. *Stallings v. Spring Meadows Apartment Complex Ltd. Partnership*, 180 Ariz. 617, 624, 886 P.2d 1373, 1380 (App. 1994). We granted review to decide whether the plaintiffs are entitled to proceed with their personal injury claim against Spring Meadows. We hold that they are. We have jurisdiction pursuant to Ariz. Const. art. 6, § 5(3)

Appendix A

FACTS AND PROCEDURAL HISTORY

The procedural history of this case includes two separate superior court actions, the first of which is the subject of this review, a federal bankruptcy court action, ancillary federal bankruptcy court proceedings occurring after the Arizona Court of Appeals rendered its decision, and numerous motions for this court to take judicial notice, or, in the alternative, to supplement the record with the pleadings and bankruptcy court orders in the ancillary proceedings. Because of the case's procedural complexity and prolixity, the parallel litigation of issues in federal and Arizona fora, and the highly technical nature of some of the arguments, we recount the facts and procedural history in detail.

On May 13, 1989, David Stallings suffered serious injuries when he fell while walking down a stairway at the Spring Meadows Apartment Complex in Glendale, Arizona. Spring Meadows carried a liability insurance policy. On January 14, 1991, within the applicable two-year statute of limitations period, *see* A.R.S. § 12-542, plaintiffs filed a personal injury action against Spring Meadows in Maricopa County Superior Court (first action). This is the only action at issue here. Unbeknownst to plaintiffs, Spring Meadows had filed for Chapter 11 bankruptcy protection on January 4, 1991,[1] which under federal law triggered an automatic stay. *See* 11 U.S.C. § 362(a). Plaintiffs filed an amended complaint on February 12, 1991, and a second amended complaint on February 26. When plaintiffs served the second amended complaint, they learned of Spring Meadows' earlier bankruptcy filing.

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1. United States District Court for the District of Arizona in Bankruptcy, Case No. 91-00025-TUC-RTB.

Appendix A

Plaintiffs filed a proof of claim with the United States Bankruptcy Court and later moved for relief from the automatic stay in the same court. Spring Meadows acting through its bankruptcy counsel,[2] did not object to plaintiffs' motion for relief from the stay. The bankruptcy court granted plaintiffs' motion on June 25, 1991, with an order (lift stay order) stating:

> 1. The automatic stay in this matter is lifted for [plaintiffs] *so that [plaintiffs] may proceed in their personal injury claims against [Spring Meadows]*;
>
> 2. The stay is lifted only *so that [plaintiffs] may proceed to secure their judgment*, and then collect any judgment they may secure based on their personal injury claims from the insurance carrier or carriers for [Spring Meadows] only;
>
> 3. To the extent any such judgment is not collectible from the liability insurance policy or policies, [plaintiffs] shall remain subject to the automatic stay and the further orders of this Court with respect to it, and shall remain a creditor of [SpringMeadows] to the extent of the balance of any such judgment remaining.

See Stallings, 180 Ariz. at 619, 886 P.2d at 1375 (emphasis added).

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2. Jeffrey Greenberg represented Spring Meadows in the original bankruptcy action. We use the term "bankruptcy counsel" to refer to Mr. Greenberg.

Appendix A

By operation of federal law, a 30-day extension of the state statute of limitations begins when a bankruptcy court lifts an automatic stay. *See* 11 U.S.C. § 108(c). After the bankruptcy court lifted the stay, plaintiffs did not refile their first action in superior court. Spring Meadows, through new counsel (liability counsel),[3] moved to dismiss plaintiffs' first action for lack of subject matter jurisdiction, arguing that the federal district court had original, exclusive jurisdiction over the action, and that plaintiffs' complaint was void because it was filed in violation of the automatic stay. The trial court converted the motion to dismiss to a motion for summary judgment and granted summary judgment to Spring Meadows. Plaintiffs filed a motion to reconsider, which the trial court denied.

Before filing their opening brief in the appeal of the first action, plaintiffs filed a second, identical complaint in superior court (second action). The trial court stayed the second action pending appeal of the first action.

In a divided opinion, the court of appeals affirmed the trial court's summary judgment for Spring Meadows in the first action. *Stallings*, 180 Ariz. at 624, 886 P.2d at 1380. The majority reasoned that (1) under Ninth Circuit case law, plaintiffs' complaint was void because it was filed in violation of the automatic stay, 180 Ariz. at 620-21, 886 P.2d at 1376-77, citing, *In re Schwartz*, 954 F.2d 569, 571-72 (9th Cir. 1993); (2) "lifting" a stay is not the same as '"annulling" a stay and does not retroactively validate a void act, 180 Ariz. at 621-22, 886 P.2d at 1377-78; and (3) the trial court did not err in denying plaintiffs'

---

3. We use the term "liability counsel" to refer to all of the attorneys from Teilborg, Sanders & Parks, P.C. who have filed pleadings or have appeared in this court or in bankruptcy court representing Spring Meadows after the lift stay order was issued.

motion to amend their complaint because the complaint was a nullity, therefore there was nothing to amend. 180 Ariz. at 622-23, 886 P.2d at 1378-79. The dissent would have reversed the trial court, concluding:

> The net result reached by the majority is that because the [plaintiffs'] complaint was filed when the stay was in effect, the complaint, being void, did not toll the statute of limitations. Thus, the [plaintiffs'] claim against Spring Meadows has been extinguished on a technicality, one not necessary to protect Spring Meadows' bankruptcy estate. . . . It does no violence to the Bankruptcy Code to hold that, where the debtor has liability insurance coverage, the order lifting the stay returns the parties to the status of the legal relationship that existed before the stay was entered. . . . To hold otherwise exalts form over substance and leads to injustice in this case.

180 Ariz. at 624-25, 886 P.2d at 1380-81 (Toci, J., dissenting).

After the court of appeals filed its opinion, plaintiffs moved in bankruptcy court for clarification of that court's lift stay order, which the court granted, stating that it had intended to grant retroactive relief (clarification order). In the alternative, the court explicitly "annu[led]" the automatic stay "for the limited purpose of providing relief retroactive to and including January 14, 1991, thereby validating [plaintiffs'] filing of [their] personal injury complaint against [Spring Meadows] in Maricopa County Superior Court . . . such that said filing was not a void act. . . . "

Appendix A

Spring Meadows, acting through its liability counsel, appealed the clarification order to the Ninth Circuit Bankruptcy Appellate Panel but ultimately withdrew its appeal as untimely filed. Spring Meadows then moved in bankruptcy court to correct the clarification order. That court denied the motion. Spring Meadows filed a motion to reconsider, and the bankruptcy court denied that motion as well. Spring Meadows then filed a renewed motion to correct, which the court also denied.

STANDARD OF REVIEW

The trial court granted summary judgment on a question of law. We therefore review de novo the trial court's ruling. *Tovrea Land & Cattle Co. v. Linsenmeyer,* 100 Ariz. 107, 114, 412 P.2d 47, 52 (1966).

DISCUSSION

The court of appeals determined that the bankruptcy court "prospectively lifted the stay . . . . but did not validate the prior-filed complaint. " 180 Ariz . at 623, 886 P. 2d at 1379 . As the dissent accurately stated, the "net result" of the majority decision is that the statute of limitations ran on plaintiffs' cause of action because they did not file an identical complaint after the lift stay order was issued.

Preliminarily, we note that the majority's approach was backwards. The majority first concluded that actions in violation of the automatic stay are void, not voidable, 180 Ariz. at 621, 886 P.2d at 1377, citing *In re Scwhartz,* 954 F.2d 569, 571-72 (9th Cir. 1992). The majority then held that, although the bankruptcy court has authority to grant retroactive relief from the automatic

stay, it did not grant retroactive relief in this case because the court "lifted" but did not "annul" the stay. 180 Ariz. at 622-23, 886 P.2d at 178-79. The threshold issue, however, is not whether plaintiff's original complaint was void or voidable but whether the bankruptcy court granted retroactive relief such that plaintiffs' complaint was filed within the statutory period. The Ninth Circuit has stated: "If a creditor obtains retroactive relief . . . there is no violation of the automatic stay, and whether violations of the stay are void or voidable is not at issue." *In re Scwhartz*, 954 F.2d at 573. Thus, the court of appeals should have determined first whether the bankruptcy court granted retroactive relief.

We need not decide whether the filing of the original complaint was a void or voidable act because we hold that the bankruptcy court granted plaintiffs retroactive relief. In deciding that the relief was prospective only, the majority of the court of appeals read "annulment" narrowly: "Ordinarily, courts annul a stay only where the debtor filed the bankruptcy petition in bad faith or engaged in some form of misconduct." 180 Ariz. at 622, 886 P.2d at 1378. Absent an "annulment," the majority concluded, the order could not be retroactive. We disagree that federal law mandates such a restrictive analysis in th s case. 11 U.S.C § 362(d) states that a court shall, under certain conditions, grant "relief" to a party in interest, "such as by terminating, annulling, modifying, or conditioning such stay. . . ." The list of possible forms of "relief" is merely illustrative. Indeed, in this case when the bankruptcy court "lift[ed]" the stay, it did not employ any of the words on the statutory list.

If Congress had meant that a bankruptcy court can only grant retroactive relief from the automatic stay if it "annuls" the stay, it would have said so. Instead, the legislative history

indicates that the bankruptcy court has broad discretion in granting relief. *See* 11 U.S.C. §S 362, Revision Notes and Legislative Reports 1978 Acts (1978 Revision Notes) ("The facts of each request will determine whether relief is appropriate under the circumstances."); *In re Jewett,* 146 B.R. 250, 251 (Bankr. 9th Cir. 1992) (bankruptcy court's decision to grant relief reviewed for abuse of discretion).

The 1978 Revision Notes also present a series of examples where relief would be appropriate. Among the examples is "a desire to permit an action to proceed to completion in another tribunal. . . ." In addition, "[o]ther causes might include the lack of any connection with or interference with the pending bankruptcy case." These examples do not differentiate among types of relief. Thus, in contrast to the rigid logic of the court of appeals' opinion, there are no set criteria or magic words for granting relief.

In this case, although the bankruptcy court did not employ any of the words from the § 362(d) list, the court did lift the stay so that plaintiffs could "proceed" with their action in state court, which corresponds to the language of one of the examples in the legislative history. More importantly, when plaintiffs moved for relief from the automatic stay, the bankruptcy court knew that their complaint had been filed in state court and served on Spring Meadows. In this situation, had the bankruptcy court meant to require the filing of an identical complaint, it surely would have said so. The common meaning of "proceed' is "to go forward or onward, especially after an interruption; continue." *The American Heritage Dictionary of the Enqlish Lanauage* 1444 (3d ed. 1992) In interpreting the lift stay order, we assume that the court intended that the words it used would be understood by their common meanings. *See* 60 C.J.S. *Motions & Orders* § 64, at

109-11 (1969) (same rules of construction apply to court orders as to any other writing); *Huerta v. Flood*, 103 Ariz. 608, 611, 447 P.2d 866, 869 (1968) ("words . . . are to be given their ordinary meaning unless it appears from the context or otherwise that a different meaning is intended"). In this case, it does not appear from the context or otherwise that the bankruptcy court intended anything other than for plaintiffs to proceed with their original complaint. Moreover, we can think of no reason why the bankruptcy court, having concluded that plaintiffs should be free to pursue their cause of action in state court, would then place a burden on plaintiffs and on our state court system by requiring plaintiffs to file a second, identical complaint.

We hold that the original lift stay order granted plaintiffs retroactive relief from the automatic stay, and the original complaint was a valid instrument. Indeed, the bankruptcy court's clarification order, of which we have taken judicial notice, explicitly granted retroactive relief. This court and the bankruptcy court therefore appear to be in harmony on this issue.

DISPOSITION

We hold that the bankruptcy court granted plaintiffs retroactive relief from the automatic stay such that plaintiffs were not required to refile their original complaint within the 30-day federal extension of the state statute of limitations. We vacate the court of appeals' opinion, reverse the trial court's summary judgment for Spring Meadows, and remand the case to the trial court for denial of Spring Meadows' motion to dismiss and for further proceedings consistent with this opinion. Finally, because our decision preserves plaintiffs' first action, plaintiffs' second action can be dismissed.

Appendix A

Robert J. Corcoran, Justice (Retired)

CONCURRING:

Stanley G. Feldman, Chief Justice

Thomas A. Zlaket, Vice Chief Justice

James Moeller, Justice

Frederick J. Martone, Justice

APPENDIX B — OPINION OF THE COURT OF APPEALS OF ARIZONA FILED JUNE 16, 1994

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

1 CA-CV 92-0117

DEPARTMENT B

DAVID L. STALLINGS and BARBARA J. STALLINGS, husband and wife,

Plaintiffs-Appellants,

v.

THE SPRING MEADOWS APARTMENT COMPLEX LIMITED PARTNERSHIP, an Arizona Limited Partnership,

Defendant-Appellee.

OPINION

Appeal from the Superior Court of Maricopa County

Cause No. CV 91-00953

The Honorable Alfred J. Rogers, Judge

AFFIRMED

Appendix B

Goldberg & Osborne
by John E. Osborne
Attorneys for Plaintiffs-Appellants — Tucson

Teilborg, Sanders & Parks, P.C.
by Richard A. Kent
Bruce C. Smith
Attorneys for Defendant-Appellee — Phoenix

CONTRERAS, Judge

David L. Stallings and Barbara J. Stallings ("Stallings") appeal the superior court's dismissal of their personal injury lawsuit in response to defendant's argument that the complaint, filed after defendant's filing of a Chapter 11 bankruptcy petition, violated the automatic stay provision of the bankruptcy statutes. We find that the filing of the complaint was a void, rather than voidable act; that a subsequent bankruptcy court order lifting the automatic stay did not annul the stay and retroactively validate the complaint; and that the superior court did not abuse its discretion in denying the Stallings' request for leave to amend its complaint in an attempt to relate it back to the original filing. Therefore, we affirm the judgment of the superior court in favor of defendant Spring Meadows Apartment Complex Limited Partnership ("Spring Meadows").

Appendix B

FACTS AND PROCEDURAL HISTORY

On January 4, 1991, Spring Meadows, the limited partnership that owned the Spring Meadows apartments, filed a petition for Chapter 11 bankruptcy. By operation of law,[1] the automatic stay of the Bankruptcy Code went into effect the moment Spring Meadows filed its petition. *Miller v. National Franchise Services*, 167 Ariz. 403, 406, 807 P.2d 1139, 1142 (App. 1991).

The Stallings, unaware of Spring Meadows' bankruptcy, filed a personal injury complaint against Spring Meadows on January 14, 1991. The complaint sought damages for personal injuries that David L. Stallings had sustained on May 13, 1989

---

1. Section 362 of the Bankruptcy Code provides for an automatic stay of all proceedings against bankruptcy petitioners and their property. This statute provides in pertinent part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of—
>
> (1) the commencement . . . including the issuance or employment of process, of a judicial, . . . or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title . . . , or to recover a claim against the debtor that arose before the commencement of the case under this title . . . ;

11 U.S.C. § 362(a)(1).

while descending a stairway at the Spring Meadows apartment.[2] The Stallings amended their complaint twice and ultimately served it on Spring Meadows on February 26, 1991.

Upon service of the complaint, the Stallings learned of the bankruptcy and realized that the automatic stay had been in effect when they filed their personal injury action. They then filed a proof of claim and a motion to lift the stay with the United States Bankruptcy Court. In their motion, the Stallings cited in support of their request for relief from the stay a single legal authority: Local Rule of Bankruptcy Procedure 4001.[3] They did not ask for relief under 11 U.S.C. section 362(d) nor ask that the bankruptcy stay be annulled.

Spring Meadows did not oppose the Stallings' motion for relief from the automatic stay, and on June 25, 1991, the bankruptcy court granted the Stallings' motion and lifted the stay. The bankruptcy court entered an order prepared by the Stallings' counsel which stated in pertinent part:

> NOW, THEREFORE, It is hereby ordered as follows:
>
> 1. The automatic stay in this matter is lifted

---

2. Under Arizona Revised Statutes Annotated ("A.R.S.") section 12-542, the statute of limitations for the personal injury claims arising out of this incident ran on May 13, 1991.

3. Local Rule of Bankruptcy Procedure 4001 sets forth the procedure for seeking relief from the automatic stay but not the substantive bases entitling a party to such relief. The permissible grounds for the termination, annulment, modification or conditioning of the stay are set forth in 11 U.S.C. section 362(d).

> for the Stallings so that the Stallings may proceed in their personal injury claims against the Debtor;
>
> 2. The stay is lifted only so that the Stallings may proceed to secure their judgment, and then collect any judgment they may secure based on their personal injury claims from the insurance carrier or carriers for the Debtor only;
>
> 3. To the extent any such judgment is not collectible from the liability insurance policy or policies, the Stallings shall remain subject to the automatic stay and the further orders of this Court with respect to it, and shall remain a creditor of the Debtor to the extent of the balance of any such judgment remaining.

The order does not state that it "annuls" the stay or that it provides retroactive relief to the Stallings.

The Stallings notified Spring Meadows of the bankruptcy court's order and asked Spring Meadows to answer their complaint. Instead, Spring Meadows filed a motion to dismiss the personal injury action in the superior court pursuant to Rules 12(b)(1), (3), (4), (5) and (6) of the Arizona Rules of Civil Procedure. Spring Meadows argued that the bankruptcy court had original, exclusive jurisdiction and thus that the superior court lacked subject matter jurisdiction over the case. In addition, Spring Meadows contended that the filing of the complaint was a void act because it was in violation of the automatic stay issued by the bankruptcy court. The Stallings

opposed the motion, arguing that the automatic stay did not deprive the superior court of jurisdiction; the complaint was voidable, not void; and the bankruptcy court had lifted the stay pursuant to Local Rule of Bankruptcy Procedure 4001, allowing the personal injury claim to proceed in state court. The superior court treated the motion to dismiss as a motion for summary judgment and granted summary judgment in favor of Spring Meadows.[4] The Stallings filed a motion for reconsideration and for leave to amend their complaint. The superior court denied both motions and entered judgment in favor of spring Meadows. The Stallings timely appealed.

ISSUES

In reviewing the superior court's grant of summary judgment in favor of Spring Meadows, we must resolve:

> (1) whether the Stallings' complaint was void because it was filed after issuance of the automatic stay;
>
> (2) if the complaint was void, whether the

---

4. The Stallings question the appropriateness of treating the motion to dismiss as a motion for summary judgment. In its motion to dismiss, Spring Meadows went beyond the confines of the Stallings' complaint by presenting matters of record from the bankruptcy proceeding. Arizona Rule of Civil Procedure 12(b) states, "If, on a motion asserting the defense numbered 6 to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . ." Accordingly, the trial court properly treated the motion as one for summary judgment.

bankruptcy court order lifting the stay annulled the stay and thereby validated the complaint; and

(3) whether the superior court erred in denying leave to the Stallings to file an amended complaint.

DISCUSSION

I. Standard of Review

The parties do not dispute the facts; therefore, because this case presents a question of law requiring application of the federal bankruptcy statutes, our review of the superior court's grant of summary judgment is de novo. *Libra Group, Inc. v. State*, 167 Ariz. 176, 179, 805 P.2d 409, 412 (App. 1991), *review denied* 168 Ariz. 337, 813 P.2d 318 (1991). We must determine if Spring Meadows is entitled to judgment as a matter of law. *Orme School v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). In doing so, we are bound by the decisions of the federal courts interpreting federal statutes. *First Nat. Bank of Arizona v. Carruth*, 116 Ariz. 482, 483, 569 P.2d 1380, 1381 (App. 1977).

We review the superior court's denial of leave to amend the Stallings' complaint for a clear abuse of discretion. *Bishop v. State, Dept. of Corrections*, 172 Ariz. 472, 474, 837 P.2d 1207, 1209 (App. 1992).

II. A Complaint Filed in Violation of Automatic Stay is Void

The Stallings argue that the filing of their complaint in violation of an automatic stay was merely a voidable act.[5] They rely on *Sikes v. Global Marine, Inc.*, 881 F.2d 176 (5th Cir. 1989), *rehearing denied by* 888 F.2d 1388 (5th Cir. 1989), in which the Fifth Circuit found that the filing of a complaint in violation of the stay was voidable but not void. *Id.* at 178-79. The court reasoned that provisions of the Bankruptcy Code such as section 362(d), by giving courts the power to grant retroactive relief from a stay, indicated Congressional intent that acts in violation of a stay be simply voidable.[6] *Id.*

Spring Meadows, however, urges us to adopt the rule of the Ninth Circuit that any act committed in violation of an automatic stay is void. *Hillis Motors, Inc. v. Hawaii Auto. Dealers Ass'n*, 997 F.2d 581, 586 (9th Cir. 1993); *In re Schwartz*, 954 F.2d 569, 571-72 (9th Cir. 1992) (holding that violations of the automatic stay are void and rejecting the reasoning of *Sikes*).[7] The circuit

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5. This distinction is important because if the filing of the complaint in violation of the automatic stay was void, the complaint is without any legal effect. If the filing was merely voidable, the complaint would be valid because Spring Meadows made no attempt to have it voided in the Chapter 11 bankruptcy. *In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992).

6. Section 362(d) allows the bankruptcy court to annul the stay and validate actions taken subsequent to the imposition of the stay.

7. The Stallings cite to other Ninth Circuit decisions of the Bankruptcy Appellate Panel ("BAP") holding that violations of the stay were voidable, not void. *See, e.g., In re Brooks*, 79 B.R. 479 (Bankr. 9th Cir. 1987), *aff'd on other grounds* 871 F.2d 89 (9th Cir. 1989). The BAP is the first level of review for

(Cont'd)

court found such acts void even when the violation of the stay was an innocent and unknowing one. *Id.* at 573; *see also Miller*, 167 Ariz. at 407, 807 P.2d at 1143 ("[A]ctions which violate the stay are void even when there is no actual notice of the existence of the stay.").

We find the interpretation adopted by the Ninth Circuit in *Schwartz*, 954 F.2d at 571-72, the better reasoned rule and binding on us. In concluding that acts taken in violation of the stay are void, the court acknowledged that Congress had recognized the vital role of the automatic stay in granting the debtor respite from creditors and any collection efforts, harassment, or foreclosure actions in order to prepare a plan of repayment or reorganization. *Id.* at 571. If violations of the stay were merely voidable, debtors would have to "spend a considerable amount of time and money policing and litigating creditor actions. If violations are void, however, debtors are afforded better protection and can focus their attention on reorganization." *Id.*

The Ninth Circuit's view is consistent with the weight of authority. "The majority of courts have long stated that violations of the automatic stay are void and of no effect." *Id.* at 572, *citing Kalb v. Feuerstein*, 308 U.S. 433, 438 (1940); *Ellis v. Consolidated Diesel Elec. Corp.*, 894 F.2d 371, 372-73 (10th Cir.

(Cont'd)

decisions from the bankruptcy court and is an alternative to review by the district court. 28 U.S.C. § 158(b)(1); Bankr. R. 8001(e). The decisions of the BAP, however, are reviewed by the circuit courts of appeal, 28 U.S.C. section 158(d), and the BAP is bound to follow the precedents of the Ninth Circuit. Because the BAP decisions relied upon by the Stallings are now contrary to the law of the Ninth Circuit, they are no longer authoritative.

1990); *In re 48th St. Steakhouse*, 835 F.2d 427, 431 (2d Cir. 1987), *cert. denied* 485 U.S. 1035 (1988); *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1308 (11th Cir. 1982). In fact, our supreme court has previously so held, *See Great Southwest Fire Ins. v. Triple "I" Ins. Serv., Inc.*, 151 Ariz. 283, 286, 727 P.2d 336, 339 (1986) (judgment entered in violation of automatic stay is void).

Therefore, the filing of the Stallings' complaint was a void act without legal significance. We turn next to the effect of the court's order lifting the automatic stay.

III. The Bankruptcy Court Lifted but Did Not Annul the Stay

Section 362(d) of the Bankruptcy Code gives the bankruptcy court the power to grant creditors relief from an automatic stay. *Schwartz*, 954 F.2d at 572. This section provides in pertinent part:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay — . . . .

11 U.S.C. §362(d). This provision not only gives "the bankruptcy court wide latitude in crafting relief from the automatic stay," but also the authority to "grant retroactive relief from the stay." *Schwartz*, 954 F.2d at 572. If a creditor obtains such retroactive relief, the creditor has not violated the automatic stay, and an otherwise void act becomes a valid one.

Id. at 573. (If the court grants retroactive relief, the void or voidable nature of an action in violation of stay is not an issue).

A. Lifting a Stay is not Equivalent to Annulment

The Stallings argue that the bankruptcy court order lifting the stay constituted an annulment and that this court should disregard the violation of the stay and treat their original complaint as validly filed in the superior court.[8] We conclude, however, that the court's order did not annul the stay or grant the Stallings retroactive relief and thus did not validate their complaint.

Annulment of a stay is an extraordinary measure and is appropriate only in limited circumstances. *In re Shamblin*, 890 F.2d 123, 126 (9th Cir. 1989) (stay should be annulled only in extreme circumstances); *In re Jewett*, 146 B.R. 250, 252 (Bankr. 9th Cir. (1992) (same). Ordinarily, courts annul a stay only where the debtor filed the bankruptcy petition in bad faith or engaged in some form of misconduct. *See, e.g., Shamblin*, 890 F.2d at 126 (finding that stay had not been annulled where order of bankruptcy court unclear and equities favored debtors); *Algeran v. Advance Ross Corp.*, 759 F.2d 1421, 1425 (9th Cir. 1985) (annulling stay and validating creditor's foreclosure sale of pledged stock after debtor misrepresented intent to file bankruptcy); *see also In re Albany Partners, Ltd.*, 749 F.2d 670,

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8. Spring Meadows argues that the Stallings waived this argument by not raising it in their opposition to the motion to dismiss. Although the argument is more clearly set forth in the motion for reconsideration and the appellate briefs, the Stallings have argued throughout this litigation that the intent of the bankruptcy court order was to allow them to continue their state court action. Accordingly, we find that they did timely raise this argument.

675 (11th Cir. 1984) (finding stay appropriately annulled where petition filed in bad faith); 2 *Collier on Bankruptcy* § 362.11 at 362-85 (15th ed. 1994) ("In some cases, courts have been persuaded to annul the automatic stay when the filing of the Chapter 11 case was in bad faith.").

Here, no evidence demonstrates that Spring Meadows filed its bankruptcy petition in bad faith or committed any other misconduct that would justify annulling the stay. In addition, Stallings' motion for relief from the stay did not specifically request an annulment as opposed to mere prospective termination. *See also* 2 *Collier on Bankruptcy* § 362.07 at 362-61 ("The use of the word 'annulling' permits the [court's] order to operate retroactively, thus validating actions taken by a party at a time when he was unaware of the stay. Such actions would otherwise be void.")

Finally, the bankruptcy court's order neither used the word "annul" nor granted retroactive relief. The order simply provided that the stay was being "lifted" so that the Stallings could "proceed in their personal injury claims against the debtor." The wording suggests that the stay was prospectively terminated, as of the date of the order, for the limited purpose of permitting the Stallings to institute a personal injury action against Spring Meadows.[9]

---

9. Regardless of the expiration of any statute of limitations, 11 U.S.C. § 108(c) provides creditors with a thirty day grace period after "notice of the termination or expiration" of the stay to file any civil action against the debtor. Accordingly, even though the Arizona statute of limitations had run on their personal injury claim by the time the stay was lifted, section 108(c) provided the Stallings with an additional thirty days from the date the stay was lifted to file a new action against Spring Meadows. However, the Stallings never filed such an action within that time period.

Appendix B

B. Fifth Circuit Rule on Annulment Rejected

The Stallings urge us to adopt the more liberal rule of annulment espoused by the Fifth Circuit in *Sikes v. Global Marine, Inc.* under circumstances similar to this case. After Global had filed a Chapter 11 bankruptcy petition, the Sikes filed a personal injury lawsuit against Global in a Texas district court. Once the Sikes learned of the bankruptcy, they sought relief from the automatic stay in the bankruptcy court. The bankruptcy court eventually lifted the stay for 32 different causes, including the Sikes, " 'for the limited purpose of allowing the personal injury actions . . . to be commenced against Global, permitting the personal injury actions that are pending against Global to proceed. . . .' " *Id.* at 178. The Fifth Circuit found that this order annulled the stay and validated the Sikes' previously filed complaint. *Id.* at 178-79.

In reaching this conclusion, the Fifth Circuit failed to address the cases holding that a stay should be annulled only in limited circumstances. *Id.* at 179. The court cited a single case, *In re Albany Partners, Ltd.*, 749 F.2d 670 (11th Cir. 1984), as support for its determination that the order annulled the stay. In *Albany Partners*, however, the bankruptcy court annulled the stay because the debtor filed the bankruptcy petition in bad faith and attempted to circumvent its obligations to the creditor. Accordingly, *Albany Partners* does not support annulment of the stay under the circumstances existing either in *Sikes* or in this case.

We are convinced by the reasoning of the decisions that take a more restrictive view of the bankruptcy court's authority to annul a stay. Because annulment essentially extinguishes the stay, we agree that it should be reserved to those circumstances

in which a debtor has filed a petition in bad faith or has misused the bankruptcy laws. Furthermore, in this case, the bankruptcy court did not clearly grant, nor the Stallings request, an annulment with retroactive effect. Therefore, we find the court's order prospectively lifted the stay to permit the Stallings to proceed but did not validate the prior-filed complaint.

In light of this finding, we need not address the parties' remaining contentions regarding the extent of jurisdiction vested in the federal district courts and whether that jurisdiction precludes subject matter jurisdiction in the superior court.

IV. Denial of the Stallings' Motion to Amend Their Complaint

In their motion to reconsider filed in the superior court, the Stallings also requested leave to file an amended complaint under Rule 15(a), Arizona Rules of Civil Procedure. They now ask us to reverse the denial of their request so that they may file a new complaint that would relate back to their original complaint pursuant to Rule 15(c), Arizona Rules of Civil Procedure.

The superior court should freely grant leave to amend when the interests of justice will be served, but no automatic right to amend exists. *In re Estate of Torstenson*, 125 Ariz. 373, 376, 609 P.2d 1073, 1076 (App. 1980). A court does not abuse its discretion by denying leave to amend when the amendment would be futile. *Id.*

Here, the superior court's denial of leave to amend was appropriate for two reasons. First, the Stallings did not actually intend to amend their complaint; they asked only for permission

to file an identical, third amended complaint. Our procedural rules, however, permit a party to "amend" a pleading; they do not allow a party to simply refile an identical pleading already filed. Ariz. R. Civ. P. 15(a).

Second, the Stallings' attempt to relate an amended complaint back to their original complaint would be futile because we have concluded that the original complaint was void. *Schwartz*, 954 F.2d at 571-72. No valid complaint exists to which a third amended complaint could relate. Therefore, the superior court did not abuse its discretion in denying the Stallings' motion to amend.

V. Discussion Relating to Dissent

The dissent contends that our decision exalts form over substance and that the Stallings' complaint was extinguished on a technicality. Although these contentions have superficial appeal, they do not comport with the applicable substantive law. Our holding that the complaint was void is consistent with and follows the federal law in this circuit. We can see no benefit to an Arizona state court interpretation of federal bankruptcy law which is at odds with that of this circuit's federal court. Furthermore, if Stallings' counsel sought retroactive relief from the stay, he failed to clarify that fact, and he also failed to bring his client's claim within the cases authorizing such relief. We note, also, that although a discharge in bankruptcy does not preclude an action to recover from the debtor's liability insurer, the stay remains in effect until properly annulled in accordance with federal statutes.

Appendix B

CONCLUSION

Therefore, we hold that the Stallings' complaint filed in violation of the automatic stay was void. The order of the bankruptcy court lifting the stay neither annulled the stay nor granted any type of retroactive relief. Although the Stallings could have refiled their complaint once the stay was lifted, the order did not reach back in time to validate the Stallings' earlier-filed complaint. Finally, because the Stallings' attempt to amend their complaint and relate it back to the filing of the original complaint would prove futile, the superior court did not abuse its discretion in denying the Stallings leave to amend. We affirm the decision of the superior court dismissing this action.

s/ Joe W. Contreras
JOE W. CONTRERAS, Judge

CONCURRING:

s/ Sheldon H. Weisberg
SHELDON H. WEISBERG, Presiding Judge

Appendix B

TOCI, Judge, dissenting.

I respectfully dissent. When the Stallings filed their personal injury action, their attorney did not know that Spring Meadows had filed a Chapter 11 bankruptcy petition. After learning about the bankruptcy, the Stallings' attorney requested that the stay be lifted to allow the Stallings to proceed with their personal injury action. The bankruptcy court entered an order lifting the stay to the limited extent of allowing the case to proceed to judgment, with collection limited to the debtor's insurance coverage. In other words, the bankrupt's estate was not and could not be affected by the outcome of the Stallings' lawsuit.

Nevertheless, under the majority's reasoning, the order lifting the stay was not sufficient. The majority adopts the law announced by the Ninth Circuit and concludes that because the filing of the lawsuit was in violation of the stay, it was therefore void. The majority also concludes that the Stallings were required to do more than to simply have the stay lifted — they were also required to ask for retroactive relief or that the stay be annulled. The net result reached by the majority is that because the Stallings' complaint was filed when the stay was in effect, the complaint, being void, did not toll the statute of limitations. Thus, the Stallings' claim against Spring Meadows has been extinguished on a technicality, one not necessary to protect Spring Meadows bankruptcy estate.

I would reject the rule announced by the Ninth Circuit in *In re Schwartz*, 954 F.2d 569 (9th Cir. 1992), for several reasons. First, the rationale for the rule that acts taken in violation of a stay are void applies to grant the *debtor* relief from creditors and from collection efforts so that the *debtor* may prepare a plan of

reorganization. *Id.* at 571 (citing H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1978)). That rationale is not present here — this case does not involve any effort to hinder or impede the debtor's reorganization plan. The Stallings are entitled to recover a judgment only from the liability insurance proceeds. The payment of insurance proceeds will not affect the debtor or any of its creditors one way or the other. Thus, the rationale for the *Schwartz* rule does not exist here.

Second, the weight of authority referred to by the majority simply does not apply in this situation. The cases cited by the majority are cases in which some effort was made to proceed with collection efforts against the *debtor* personally after a stay was entered. *See Kalb v. Feuerstein*, 308 U.S. 433, 438 (1940); *In re Schwartz*, 954 F.2d at 572; *Ellis v. Consolidated Diesel Elec. Corp.*, 894 F.2d 371 (10th Cir. 1990); *In re 48th St. Steakhouse, Inc.*, 835 F.2d 427, 431 (2nd Cir. 1987), *cert. denied*, 485 U.S. 1035 (1988); *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1308 (11th Cir. 1982). And, although the majority cites *Miller v. National Franchise Services, Inc.*, 167 Ariz. 403, 407, 807 P.2d 1139, 1143 (App. 1991), for the proposition that actions which violate the stay are void, this court has also held to the contrary in *Flexmaster Aluminum Awning Co. v. Hirschberg*, 173 Ariz. 83, 839 P.2d 1128 (App. 1992). Consequently, in these circumstances, no reason exists to blindly follow the Ninth Circuit.

Third, most courts hold that a discharge in bankruptcy does not preclude an action against a discharged debtor as the nominal defendant where he is insured against liability for negligence. *See, e.g., In re Edgeworth*, 993 F.2d 51 (5th Cir. 1993); *First Fidelity Bank v. McAteer*, 985 F.2d 114 (3rd Cir. 1993); *Green v. Welsh*, 956 F.2d 30, 35 (2nd Cir. 1992); *In re Fernstorm Storage*

& Van Co., 938 F.2d 731, 733-34 (7th Cir. 1991); *In re Jet Florida Sys., Inc.*, 883 F.2d 970, 976 (11th Cir. 1989); *In re Beeney*, 142 B.R. 360, 362-63 (Bankr. 9th Cir. 1992); *In re Greenway*, 126 B.R. 253, 255 (Bankr. E.D. Tex. 1991); *In re Peterson*, 118 B.R. 801, 804 (Bankr. D.N.M. 1990); *In re Traylor*, 94 B.R. 292, 293 (Bankr. E.D.N.Y. 1989); *In re Lembke*, 93 B.R. 701, 702-03 (Bankr. D.N.D. 1988); *In re White*, 73 B.R. 983 (Bankr. D.D.C. 1987); *In re Mann*, 58 B.R. 953, 958 (Bankr. W.D. Va. 1986). A discharge in bankruptcy does not extinguish the debt itself; it merely releases the debtor from personal liability for the debt. *Edgeworth*, 993 F.2d at 53. Section 524(e)[10] of the Bankruptcy Code specifies that the debt still exists and can be collected from any other entity that may be liable. *Edgeworth*, 993 F.2d at 53. Thus, courts have held that the scope of a section 524 injunction does not prevent a proceeding against the discharged debtor to establish a claim against the debtor's liability insurer. *Id.* at 54.

> The foundation of this reading of § 524(a)(2) is that it makes no sense to allow an insurer to escape coverage for injuries caused by its insured merely because the insured receives a bankruptcy discharge. "The 'fresh-start' policy is not intended to provide a method by which an insurer can escape its obligations based simply on the financial misfortunes of the insured."

Id. at 54 (quoting *In re Jet Florida*, 883 F.2d at 975). The same rationale should apply here.

---

10. 11 U.S.C. § 524(e) (1988) states: "Except as provided in subsection (a) (3) of this section, discharge of a debt of the debtor *does not affect the liability of any other entity on, or the property of any other entity for, such debt.*" (Emphasis added.)

Appendix B

The conclusion that the Stallings' complaint is void because the bankruptcy court did not specifically annul the stay or grant retroactive relief is hypertechnical and unnecessary to protect the debtor or its estate. It does no violence to the Bankruptcy Code to hold that, where the debtor has liability insurance coverage, the order lifting the stay returns the parties to the status of the legal relationship that existed before the stay was entered. *First Nat'l Bank of Minneapolis v. Kehn Ranch, Inc.*, 394 N.W.2d 709, 715 (S.D. 1986). In other words, the filing of a complaint in violation of the stay is, under these particular circumstances, voidable rather than void. To hold otherwise exalts form over substance and leads to injustice in this case.

s/ Philip E. Toci
PHILIP E. TOCI, Judge

APPENDIX C — MINUTE ENTRY OF THE MARICOPA COUNTY SUPERIOR COURT FOR THE STATE OF ARIZONA DATED NOVEMBER 22, 1991

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

HON. ALFRED J. ROGERS

November 22, 1991 — D. Glab, Deputy

John Edward Osborne

Richard A. Kent

No CV 91-00953

DAVID L. STALLINGS, et ux

v.

THE SPRING MEADOWS APARTMENT COMPLEX LIMITED PARTNERSHIP, et al

This matter having been under advisement:

The Court is treating the Defendant, Spring Meadows Apartment Complex's Motion to Dismiss as a Motion for Summary Judgment.

IT IS ORDERED that the Defendant's Motion to Dismiss/ Summary Judgment is granted.

APPENDIX D — JUDGMENT OF THE MARICOPA COUNTY SUPERIOR COURT FOR THE STATE OF ARIZONA FILED DECEMBER 24, 1991

Richard A. Kent, Esq./State Bar No. 006375
Bruce C. Smith, Esq./State Bar No. 11721
TEILBORG, SANDERS & PARKS, P.C.
1300 The Abacus Building
3030 North Third Street
Phoenix, Arizona 85012
(602) 230-5750

Attorneys for Defendants

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

No. CV 91-00953

DAVID L. STALLINGS, and BARBARA J. STALLINGS, husband and wife,

Plaintiffs,

v.

THE SPRING MEADOWS APARTMENT COMPLEX LIMITED PARTNERSHIP, an Arizona Limited Partnership, et al.,

Defendants.

JUDGEMENT

(Assigned to the Honorable Alfred Rogers)

The Court having granted the Motion for Summary Judgment filed by Defendant The Spring Meadows Apartment

Appendix D

Complex Limited Partnership and finding no just reason for delay.

IT IS ORDERED that Judgment is hereby entered in favor of Defendant The Spring Meadows Apartment Complex Limited Partnership.

DATED this __ day of December, 1991.

The Honorable Alfred Rogers
JUDGE OF THE SUPERIOR COURT

Appendix D

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

HON. ALFRED J. ROGERS

December 24, 1991

C. Gabel
Deputy

John Edward Osborne

Richard A. Kent

No. CV91-00953

DAVID L. STALLINGS, et ux.

v.

THE SPRING MEADOWS APARTMENT COMPLEX LIMITED PARTNERSHIP, et al.

IT IS ORDERED entering judgment in favor of defendant, The Spring Meadows Apartment Complex Limited Partnership, all in accordance with formal written Judgment signed by the court 12/24/91 and filed herein.

APPENDIX E — SPRING MEADOWS MOTION TO DISMISS DATED AUGUST 16, 1991

Richard A. Kent
TEILBORG, SANDERS & PARKS, P.C.
3030 North Third Street, #1300
Phoenix, Arizona 85012
(602) 230-5777

State Bar No. 006375
Attorneys for Defendants

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

No. CV 91-00953

DAVID L. STALLINGS and BARBARA J. STALLINGS, husband and wife,

Plaintiffs,

v.

THE SPRING MEADOWS APARTMENT COMPLEX LIMITED PARTNERSHIP, an Arizona Limited Partnership; JOHN DOES 1-10; JANE DOES 1-10; ABC PARTNERSHIPS 1-10; XYZ CORPORATIONS 1-10,

Defendants.

MOTION TO DISMISS

(Oral Argument Requested)

(Assigned to the Hon. Alfred Rogers)

Appendix E

Spring Meadows Apartment Complex, a limited partnership, respectfully requests this court to enter an order dismissing this action No. CV 91-00953. This court lacks subject matter jurisdiction in this case and, therefore, can proceed no further pursuant to Rule 12(b)(1)(3)(4)(5) and (6) of the Arizona Rules of Civil Procedure.

Superior Court for the State of Arizona lacks subject matter jurisdiction over this complaint. The Federal District Court has original jurisdiction over all proceedings arising under, or related to bankruptcy cases under Title 11 of the United States Code. The District Court has exclusive jurisdiction over all of the bankruptcy debtors property, including policies of insurance.

For the reasons stated as well as those contained in the attached Memorandum of Points and Authorities and the entire file herein, it is requested that the court enter an order dismissing this action pursuant to Rule 12(b)(1)

DATED this 16th day of August, 1991.

TEILBORG, SANDERS & PARKS, P.C.

By s/ Richard A Kent
Richard A. Kent
3030 North Third Street
Phoenix, Arizona 85012
Attorneys for Defendant
SPRING MEADOWS

Appendix E

MEMORANDUM OF POINTS AND AUTHORITIES

The Superior Court of the State of Arizona has no subject matter jurisdiction over this matter. There is a lack of subject matter jurisdiction because the original, exclusive jurisdiction over the subject matter of this case lies in the Federal District Court. On January 4, 1991, defendant Spring Meadows Apartment Complex, a limited partnership, filed bankruptcy under the provisions of Title 11 of the United States Code. On January 14, 1991, the plaintiffs filed their complaint against this defendant. Therefore, plaintiffs' complaint was filed in the Arizona Superior Court after Spring Meadows filed its Petition for Bankruptcy under the provisions of Title 11 of the United States Code. When the Petition for Bankruptcy was filed, the Federal District Court obtained original jurisdiction "of all civil proceedings arising under Title 11, or arising in or relating to cases under Title 11." 11 U.S.C. § 1334(b). When the Petition for Bankruptcy was filed, an automatic stay went into effect applicable to all entities. 11 U.S.C. § 1362(a)(1), (3), (6) and pertinent part provides as follows:

> (1) The commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> * * * *

(3) Any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

* * * *

(6) Any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

On January 4, 1991 an automatic stay issued which prohibited the filing of the complaint in state court on January 14, 1991. Therefore, the filing of the complaint is void and without legal affect. The undisputed facts require that this case be dismissed.

FACTS

1. On or about May 13, 1989, the plaintiff, DAVID L. STALLINGS, was injured. See, plaintiffs' complaint paragraph 6.

2. On January 4, 1991, the Spring Meadows Apartment Complex filed a Petition for Bankruptcy under Title 11, United States Code.

3. Plaintiffs filed their original complaint on January 14, 1991.

4. An automatic stay went into effect applicable to the commencement of judicial proceedings against defendants on January 4, 1991. 11 U.S.C. § 362.

5. On June 25, 1991, the Honorable Lawrence Ollason of the United States Bankruptcy Court signed an order lifting the automatic stay. (See, the automatic stay of Judge Ollason attached hereto).

6. On February 12, 1991, plaintiffs filed their First Amended Complaint and on March 4, 1991 plaintiffs filed their Second Amended Complaint.

THE STATE SUPERIOR COURT LACKS SUBJECT MATTER JURISDICTION.

The Arizona State Superior Court does not have subject matter jurisdiction over this Complaint. By operation of law, the Federal District Court has original Jurisdiction over all civil proceedings arising under, and or related to cases under Title 11 of the United States Code. (The Bankruptcy Code). The District Court has exclusive jurisdiction over all of the property of the bankruptcy debtor. The automatic stay was lifted only to the extent of any liability insurance applicable to the debtor. A debtor's insurance policy is property of the bankruptcy estate and, therefore, subject to the bankruptcy court's jurisdiction.

The Arizona State Superior Court also lacks subject matter jurisdiction because the complaints filed in State Court

* * *

THE STATE COURT COMPLAINT IS VOID AND WITHOUT LEGAL EFFECT.

Plaintiffs complaint was filed in State Superior Court in violation of the automatic stay prohibiting legal proceedings

against Spring Meadows Apartments and/or its insurance policy proceeds. The filing of a voluntary petition for bankruptcy under Chapter 11 operates as an automatic stay of:

> (1) The commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> * * * *
>
> (3) Any act to obtain possession of property of the estate or property from the estate or to exercise control over property of the estate;
>
> * * * *
>
> (6) Any act to collect, assess or recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. § 362(a)(1), (3), (6).

The State Court complaint dated January 14, 1991 must be dismissed as it is void and has no legal effect. The same is true of the amended complaints. The injuries took place on or about May 13, 1989. Plaintiffs waited over one and a half years before filing

their complaint in the State Court on January 14, 1991. At the time the complaint was filed, the automatic stay was already in effect. The claim could have been commenced before for the Petition for Bankruptcy was filed. The acts plaintiffs claim constitute negligence occurred almost two years before bankruptcy proceedings were commenced. There is no dispute that the State Court complaint was filed in violation of the automatic stay. "*Actions taken in violation of the stay are deemed void and without effect.*" *In re Baird*, 55 Bankr. 316, 318 (D.Ky. 1985) (emphasis added). The law in the Ninth Circuit is the same.

> 11 U.S.C. § 362(a)(1) of the Bankruptcy Code automatically stays the commencement or continuation of Judicial proceedings against the debtor that were or could have been commenced before the bankruptcy petition was filed. *Any proceedings in violation of the automatic stay in bankruptcy are void.*

In Re Stringer, 847 F.2d 549, 551 (9th Cir. 1988) (emphasis added). *See also, In Re Sambo's Restaurant's Inc.* 754 F.2d 811, 816 (9th Cir. 1985).

The complaint, as filed, has no legal effect. It is void and must be dismissed.

It is abundantly clear that this court has no choice but to dismiss plaintiffs' complaint. The complaint and amended complaints were all filed in direct violation of the automatic stay issued by the bankruptcy court. The law is clear. The complaints are void and without effect. They must be dismissed.

Appendix E

RESPECTFULLY SUBMITTED this 16th day of August, 1991.

TEILBORG, SANDERS & PARKS, P.C.

By s/ Richard A. Kent
Richard A. Kent
3030 North Third Street
Phoenix, Arizona 85012
Attorneys for Defendant
SPRING MEADOWS

Copy of the foregoing mailed
this 16th day of August, 1991 to:

John E. Osborne
GOLDBERG & OSBORNE
1830 East Broadway, Suite 136
Tucson, Arizona 85719
Attorneys for Plaintiffs

s/ Dorothy Flanagan

APPENDIX F — STALLINGS' OPPOSITION TO MOTION TO DISMISS DATED DECEMBER 16, 1991

GOLDBERG & OSBORNE
1830 East Broadway, Suite 136
Tucson, Arizona 85713
(602) 323-8888

John E. Osborne, Esq.
State Bar #007085
Attorneys for Plaintiffs

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

NO. CV-91-00953

DAVID L. STALLINGS and BARBARA J. STALLINGS, husband and wife,

Plaintiffs,

vs.

THE SPRING MEADOWS APARTMENT COMPLEX LIMITED PARTNERSHIP, an Arizona Limited Partnership; 1-10; JANE DOES 1-10; ABC PARTNERSHIPS 1-10; XYZ CORPORATIONS 1-10,

Defendants.

Appendix F

OPPOSITION TO MOTION TO DISMISS

Assigned to: The Hon. Alfred Rogers

Plaintiffs, David Stallings and Barbara Stallings, by and through their attorneys, oppose the defendant's Motion To Dismiss. This Opposition is based on the attached Statement of Facts, Memorandum of Points and Authorities, and exhibits.

DATED this 16th day of September, 1991.

GOLDBERG & OSBORNE

By s/ John E. Osborne
John E. Osborne
Attorneys for the Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

This case is a premises liability personal injury action. The United States Bankruptcy Court lifted the automatic stay in effect for the Defendant after the Stallings moved to lift it without opposition from Defendant.

Now Defendant seeks to undo what it permitted done in the first place. This Court should refuse. Dismissal of a complaint under Rule 12(b)(1) should be "granted sparingly and with caution." 5C *Wright & Miller Federal Practice and Procedure*, Section 1349 at 541 (1969).

Appendix F

II. STATEMENTS OF FACTS

1. On or about May 13, 1989, David L. Stallings sustained personal injuries while walking down a stairway at Spring Meadows Apartments located at 10030 North 43rd Avenue, Glendale, Arizona. *See Plaintiffs Complaint*, para. 6.

2. On or about January 4, 1991, Spring Meadows Apartments filed a Petition For Bankruptcy under Chapter 11. *See Defendant's Motion To Dismiss*, para. 2 of facts.

3. Unaware of defendant's Chapter 11 filing, the Stallings filed their original Complaint on February 12, 1991. *See Affidavit of John E. Osborne*, copy attached as Exhibit A; *Plaintiff's Complaint.*

4. On March 6, 1991, the Stallings filed a Proof of Claim with the United States Bankruptcy Court. *See Proof of Claim*, copy attached as Exhibit B.

5. On May 31, 1991, the Stallings filed a Motion For Relief From Automatic Stay in the United States Bankruptcy Court in order to proceed to secure judgment on their personal injury claims in state court, to satisfy their judgment from the liability policy of the Defendant covering this loss, and to return to bankruptcy court to satisfy the balance of their judgment. *See Motion for Relief from Automatic Stay*, copy attached as Exhibit C.

6. Defendant failed to oppose the Stallings' Motion For Relief From Automatic Stay. *See Certificate of No Objection*, copy attached Exhibit D.

Appendix F

7. On June 25, 1991, the Honorable Lawrence Ollason, U.S. Bankruptcy Judge, granted the Stallings' Motion and lifted the automatic stay, ordering specifically:

> 1. The automatic stay in this matter is lifted for the Stallings so that the Stallings may proceed in their personal injury claims against Debtor;
>
> 2. The stay is lifted only so that the Stallings may proceed to secure their judgment, and then collect any judgment they may secure based on their personal injury claims from the insurance carrier or carriers for the Debtor only;
>
> 3. To the extent any such judgment is not collectible from the liability insurance policy or policies, the Stallings shall remain subject to the automatic stay and the further orders of this Court with respect to it, and shall remain a creditor of the Debtor to the extent of the balance of any such judgment remaining.

See Order Re Stallings' Motion for Relief From Automatic Stay, copy attached Exhibit E.

Appendix F

III. Law.

A. Defendant's Motion to Dismiss Must be Denied Because The Bankruptcy Court Granted The Stallings Relief From Automatic Stay To Proceed In This Court.

Defendant's contention that this Court has no subject matter jurisdiction over this matter based on their filing bankruptcy under Title 11 of the United States Code is unfounded in case and statutory law.

It is undisputed that the United States Bankruptcy Court granted the Stallings relief from automatic stay pursuant to LRBP4001. This resulted after the time period for defendant to object to the Stallings' Motion For Relief had passed.

After relief from automatic stay has been granted, it is clear that the prevailing movants are entitled to proceed with their claims in state court. *In Re Honosky*, 6 B.R. 667 (S.D.W.Vir. 1980); *Matter Of Nkongho*, 59 B.R. 85 (D.N.J. 1986); *In Re Bock Laundry Machine Co.*, 37 B.R. 564 (N.D.Ohio 1984). In each of the above cases, the court granted the plaintiffs' Motion For Relief and allowed each to proceed with their claims in State Court[1].

---

1. In *Matter Of Nkongho*, the injured party brought suit against debtor in state court for his alleged negligent operation of motor vehicle, and moved to lift automatic stay so that he could proceed with litigation. The court permitted "the action to proceed to judgment in the state court." 59 B.R. at 86. In *In Re Bock Laundry Mach. Co.*, the court concluded "that no great prejudice will result to the estate by allowing the Movants to proceed in state court." 37 B.R. at 568.

Appendix F

Moreover, it is well-settled that the automatic stay of Section 362, which defendant cites, acts as a stay of court proceedings but does not deprive the state court of jurisdiction over the matter. *In Re Clowser*, 39 B.R. 883, 884 (E.D. Va. 1984) ("the automatic stay . . . acts as a stay of court proceedings but does not deprive the state court of jurisdiction over the matter"); *Securities & Exch. Comm'n v. Wencke*, 622 F.2d 1363, 1372 (9th Cir. 1980); *David v. Hooker, Ltd.*, 560 F.2d 412, 418 (9th Cir. 1977).

Section 362(a) prevents a judicial determination in State Court *unless* modified by the Bankruptcy Court. The modification is set forth in 11 U.S.C. Section 362(d) which states in pertinent part:

> "(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay —
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if —
>
> (A) the debtor does not have an equity in such property; and

> (B) such property is not necessary to an effective reorganization.

Id.

It should be noted that LRBP 4001 and 11 U.S.C. Section 362(d) each grant relief from automatic stay. In promulgating Section 362(d), Congress clearly intended to give the Bankruptcy Court considerable flexibility to fashion relief and to lift stays under appropriate circumstances:

> [I]t will often be more appropriate to permit proceedings to continue *in their place of origin*, when no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from many duties that may be handled elsewhere.

In Re Honosky, 6 B.R. at 669 (emphasis supplied) (citing S.Rep.No. 989, 95th Cong., 2d. Sess. 50 (1978), U.S. Code Cong. & Ad. News 1978 at 5836).

In the case at bar, the Stallings fully complied with the Bankruptcy Code and the Bankruptcy Rules of Procedure. Upon discovery of defendant's bankruptcy filing, the Stallings moved to lift the automatic stay. They did so after properly making their claim with the Bankruptcy Court by Proof of Claim, and thereby becoming a "party in interest." The United States Bankruptcy Court in the District of Arizona appropriately lifted the stay on June 25, 1991. *See* attached Exhibit "E".

If the Defendant now complains of this, its appropriate

forum is the Bankruptcy Court, not here, where the Bankruptcy Court has explicitly ordered the case to further proceed.

Generally, relief from the stay restores the parties to the legal relationships that existed before the stay became operative. 8A *C.J.S. Bankruptcy* Section 80 (1988). Whatever non-bankruptcy law governed the transactions and relationships of the parties prior to the application of the Bankruptcy Code is the law that controls the conduct of the parties once the stay is lifted. *Matter of Winslow*, 39 B.R. 869, 871 (N.D.Ga. 1984).

Judge Ollason's order clearly reveals his awareness that the Stallings were pursuing their claims in state court. The order authorized the claims to "proceed." Thus, the Bankruptcy Court permitted the Stallings to proceed in state court.

Similarly, other Bankruptcy Courts have allowed Movants to proceed in state court. *In Re Peterson*, 116 B.R. 247 (D.Colo. 1990) ("Numerous courts have permitted the stay to be lifted when the movant is simply seeking to establish the facts and amount of the debtor's liability and, as in this case, the movant has stipulated that any recovery will be sought from the debtor's insurer or a codefendant"); *In Re Ridgemont Apartment Associates*, 105 B.R. 738 (N.D.Ga. 1989); *In Re White Motor Credit*, 761 F.2d 270 (6th Cir. 1985); *Matter of Holtkamp*, 669 F.2d 505 (7th Cir. 1982).[2]

In the alternative, assuming the Federal Court has exclusive subject matter jurisdiction, legal precedent calls for the Federal Court to choose to abstain and refer the present case to State Court. *In Re White Motor Credit*, 761 F.2d 270 (6th Cir. 1985)

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2. In each of the cases cited, as well as the instant case, the Movant was granted relief from automatic stay.

("The statute authorizes abstention in the interests of justice or comity"); *In Re Page-Wilson Corp.*, 37 B.R. 527 (D.Conn. 1984). When a claim can be as expeditiously liquidated in a suit pending in another forum, and the expertise of the Bankruptcy Court is not required, that suit is often allowed to continue to avoid wasted time and effort. *Id.*, 37 B.R. at 529. Moreover, the Federal Courts are hesitant to exercise Jurisdiction when "state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought." *In Re White Motor Credit*, 761 F.2d at 274, *citing United Mine Workers v. Gibbs*, 383 U.S. 715 at 726, 86 S.Ct. 1130 at 1139 (1966).

Therefore, since all of the claims by the Stallings are state law claims, which this Court ordinarily has subject matter jurisdiction over and special expertise to handle, and no expertise of the Bankruptcy Court is required, the Superior Court is the most appropriate forum.

Based on the controlling case law herein, it is clear that the Bankruptcy Court has discretion to grant relief from the automatic stay and authorize this Court to resolve the issues and maintain subject matter jurisdiction.

B. This Court Has Jurisdiction To Adjudicate The Stallings' Claims That Seek Recovery From the Defendant's Insurance Carrier or Carriers.

The defendant contends that the insurance policy is property of the bankruptcy estate so that the only court that has subject matter Jurisdiction over the Stallings' claims involving the policy is the federal court. For the following reasons, this argument is without merit.

Appendix F

First, numerous bankruptcy courts have ruled that a prevailing Movant for relief from stay may commence and/or proceed with a claim to be collected from the debtor's insurance policy. *In Re Honosky*, 6 B.R. at 670; *In Re White Motor Credit*, 761 F.2d at 274; *In Re Peterson*, 116 B.R. at 250; Matter of Holtkamp, 669 F.2d at 509. For example, in *In Re Honosky*, the plaintiff sought to lift the automatic stay to permit her to proceed in State Court against the debtor to the extent of the liability insurance coverage. The court held:

> the automatic stay will be modified to permit the Plaintiff to proceed with her suit in the Circuit Court of McDowell County *to the extent of the Debtor's insurance coverage*."

Id.[3]

Also, allowing a civil action to go forward does not jeopardize a bankrupt estate when an insurance company assumes full responsibility for defending that litigation. *Matter of Holtkamp*, 669 F.2d at 508. *Collier on Bankruptcy* has proposed:

> Lack of adequate protection and lack of equity are not the sole grounds for relief from the stay . . . . Where the claim is one covered by insurance or indemnity, continuation of the [civil] action should be permitted since hardship to the debtor is likely to be outweighed by hardship to the plaintiff.

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3. The Circuit Court of McDowell County is a state court.

2 *Collier on Bankruptcy* Section 362.07[3] at 362-49 (15th ed. 1979).

Second, defendant's assertion that the insurance policy is the property of the bankruptcy estate is of no consequence. Even if we assume this as true (and the Stallings have no problem with the concept that the policy is property of the estate), the Bankruptcy Court has the power under 11 U.S.C. Section 362(d) to grant relief from stay with respect to such property.

In the present case, relief from automatic stay was granted "so that the Stallings may proceed to secure their Judgment, and then collect any judgment they may secure based on their personal injury claims from the insurance carrier or carriers for the Debtor only."

Conversely, in the authority cited by defendants, relief from the stay was not sought.

C. The Complaint Filed In Superior Court Has Full Legal Effect.

The general rule in this situation is that filing a complaint in an unknowing violation of the automatic stay is not void, it is voidable, and capable of discretionary cure. *In re Brooks*, 79 B.R. 479 (9th Cir. BAP 1987); *Sikes v. Global Marine, Inc.*, 881 F.2d 176, 178 (5th Cir. 1989). Both caselaw and common sense demonstrate that the complaint here is not void. *Id.*[4] Moreover,

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4. In *Sikes*, a personal injury suit was filed against debtor after debtor had filed Chapter 11 petition. Upon learning of bankruptcy petition, plaintiffs sought relief from automatic stay. Thereafter, debtors filed a motion to dismiss.

the Defendant waived this argument by failing to raise it in opposition to the Stallings' Motion to Lift Stay. Finally, the Honorable Lawrence Ollason validated the filing of the complaint when he granted the Stallings' relief from stay.[5]

Sikes is directly on point. On March 6, 1986, the Sikes filed suit for personal injury. Unbeknownst to the Sikes, the defendant had filed voluntary petitions in bankruptcy on January 27, 1986. On February 18, 1987, over objection by the debtor, the bankruptcy court lifted the stay. The debtor then filed a Motion to Dismiss, as in this case, contending that the original complaint was filed in violation of the automatic stay, and thus null and void.

The Fifth Circuit soundly rejected the debtor's argument. The court stated:

> We are persuaded that the better reasoned rule characterizes acts taken in violation of the automatic stay as voidable rather than void. We agree that "the characterization of every violation of section 362 as being absolutely void is inaccurate and overly broad." [citation omitted].

Id. at 178.

Contrary to Defendant's assertion, the rule in the Ninth Circuit is no different in this type of case. *In Re Sambo's Restaurants, Inc.*, 754 F.2d 811 (9th Cir. 1985); *see also In Re Brooks*, 79 B.R. 479 (9th Cir. BAP 1987) ("A closer look at

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5. See *Sikes* at 180.

[*Sambo's*] reveals taht it actually supports the idea that a technical violation of stay will not necessarily make that violation void.").

The Ninth Circuit distinguishes between whether transfers of property after invocation of the automatic stay are void, and whether the filing and service of a complaint is void. The former is void, the latter is voidable. For example, in *In Re Sambo's*, the Ninth Circuit gave legal effect to such a filing where plaintiff filed no timely separate proof of claim in the bankruptcy court (as the Stallings' have here), and permitted the filing and service of the plaintiff's complaint alone to act as an informal proof of claim in bankruptcy court. The court stated:

> But this rule [that actions taken in violation of the automatic stay are void] usually is applied to transfers of property and the like. No case has been cited to us nor are we aware of any case that has discussed whether the automatic stay precludes such a complaint from being an amendable informal proof of claim. Logically it should not, and we hold that it does not, *because such a rule would lead to absurd results.*

Id., 754 F.2d 811 at 816 (emphasis supplied).

While *In Re Sambo's* involved a case where the plaintiff wished to proceed in federal court, the same principles apply here to the similar issues. On the other hand, *In Re Stringer*, 847 F.2d 549 (9th Cir. 1988), cited by the Defendant, involves a post-stay child support order, and factually and legally misses the questions at issue here.

Appendix F

IV. Conclusion.

Defendant's Motion To Dismiss must be denied. The case and statutory law disclose that this Court has subject matter jurisdiction to adjudicate the instant case. The Bankruptcy Court ordered the case to "proceed" and such an order must be followed.

DATED this 16th day of September, 1991.

GOLDBERG & OSBORNE

By s/ John E. Osborne
John E. Osborne
Attorneys for the Plaintiffs

COPY mailed this 16th day
of September, 1991, to:

Richard A. Kent, Esq.
TEILBORG, SANDERS & PARKS, P.C.
3030 North Third Street, #1300
Phoenix, Arizona 85012
Counsel for Spring Meadows

APPENDIX G — EXCERPTS FROM OPENING BRIEF OF APPELLANT STALLINGS IN THE ARIZONA COURT OF APPEALS

IN THE COURT OF APPEALS OF THE STATE OF ARIZONA
DIVISION ONE

NO. 1 CA-CV 92-0117

Maricopa County Superior
Court No. CV-91-00953

DAVID L. STALLINGS and BARBARA J. STALLINGS, husband and wife,

Plaintiffs /Appellants

vs.

THE SPRING MEADOWS APARTMENT COMPLEX LIMITED PARTNERSHIP, an Arizona Limited Partnership;

Defendants/Appellees

OPENING BRIEF OF APPELLANTS
DAVID L. STALLINGS AND BARBARA J. STALLINGS

GOLDBERG & OSBORNE
John E. Osborne (#007085)
33 N. Stone Avenue, Su. 1850
Tucson, Arizona 85701
(602) 884-1492
Attorneys for David L. &
Barbara J. Stallings

summary judgment, the Plaintiff in the void action has the right to amend the Complaint filed during the pendency of the stay after the stay is lifted so that the Amended Complaint relates back to the date of the original Complaint under Rule 15(c), A.R.C.P.

SUMMARY OF ARGUMENT

11 U.S.C. Section 362(d) by its express terms permits the bankruptcy court to annul an automatic stay under 11 U.S.C. Section 362(a). An annulment permits the bankruptcy court to grant retroactive relief so that an act otherwise void because performed during the automatic stay is not void. This is what occurred here when the Stallings secured relief from the automatic stay from the bankruptcy court so that they could proceed with their lawsuit innocently filed after the stay went into effect.

The trial court here erred by relying on caselaw cited by the defendant dealing with the effect of the automatic stay under Section 362(a), not on the effect of relief from the stay under Section 362(d).

Our Arizona courts have concurrent jurisdiction with Federal courts under 28 U.S.C. Section 1334(b). This jurisdiction permits the court here to exercise subject matter jurisdiction over this lawsuit.

Section 1334(b) does not grant exclusive jurisdiction to the federal court over a "civil proceeding" such as this. The statute's grant of original jurisdiction to the district court still permits the

Arizona court to exercise its own original jurisdiction over this lawsuit once the automatic stay was lifted.

The Stallings proceeded properly when they moved for relief from the stay as they did. The bankruptcy code and rules specifically provide for relief from the stay by motion. Since the stay was annulled with the intent to permit the original action to proceed, there was no need to proceed differently.

Once the stay was lifted, the lawsuit was free to proceed as if the stay had never been in effect.

In the alternative, even if the complaint was void in this lawsuit when filed, and the bankruptcy court's Order did not annul this, Rule 15(c) provides another source of relief. This is true because grant of leave to file an amended complaint should permit the Stallings now to do the act that was void when they attempted to do it in the first place. Rule 15(c) specifically validates the "attempt" to plead, and relates the filing of an amended complaint to "the date of the original pleading." Thus, the fact that the original pleading was void should not prevent grant of leave to amend to now file an amended complaint that would relate back to before the elapse of the statute of limitations in this lawsuit.

Justice requires the relief requested. No unfair prejudice to the defendant will occur by grant of the relief requested because Spring Meadows is simply placed in the same position it would have been had it not declared bankruptcy. Spring Meadows and its liability insurer should not gain unfair advantage not authorized by the bankruptcy court through Spring Meadows' resort to bankruptcy.

* * *

APPENDIX H — EXCERPTS FROM BRIEF OF APPELLEE SPRING MEADOWS

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

No. 1 CA-CV 92-117

Maricopa County
Superior Court
No. CV 91-00953

DAVID L. STALLINGS, and BARBARA J. STALLINGS, husband and wife,

Plaintiffs,

v.

THE SPRING MEADOWS APARTMENT COMPLEX LIMITED PARTNERSHIP, an Arizona Limited Partnership,

Appellee.

BRIEF OF APPELLEE THE SPRING MEADOWS APARTMENT COMPLEX LIMITED PARTNERSHIP

TEILBORG, SANDERS & PARKS, P.C.

By: Richard A. Kent, 006375
Bruce C. Smith, 011721
3030 North Third Street
Suite 1300
Phoenix, Arizona 85012
Attorneys for Appellee

Appendix H

* * *

ARGUMENT

I. INTRODUCTION

An unfortunate fact of recent economic life in Arizona is that every year more and more bankruptcy cases are filed. According to the most recent figures, over 19,000 bankruptcy petitions will probably be filed in 1992 just in the State of Arizona. Turco, *State Bankruptcy Rate Slows, but Record Likely*, Ariz. Republic, July 10, 1992 at D1. The volume of bankruptcy petitions affect the civil litigation system because the automatic bankruptcy stay applies to all lawsuits filed against the debtor. This appeal presents the important issue of how the Arizona civil tort system should operate given the large number of bankruptcy filings, the bankruptcy statutory framework, and the constitutional deference that state courts must give to federal law matters under the Supremacy Clause.

In this case, the superior court clearly recognized the limited function that superior courts have when a plaintiff wishes to file a personal injury lawsuit against a debtor who has filed bankruptcy. The overwhelming weight of authority holds that acts done in violation of an automatic stay have absolutely no effect. The superior court appropriately dismissed the lawsuit because it was filed in violation of an automatic stay.

Appellants had several viable options to pursue in this lawsuit, but did not choose to utilize those alternatives. Before appellants filed their complaint in Maricopa County Superior Court, they could have gone to the bankruptcy court just three blocks away and put appellee's name into the bankruptcy court's

computer to see if a bankruptcy petition had been filed.[2] Appellants did not file their lawsuit in federal district court. Appellants admit that they were aware of 11 U.S.C. § 108(c), but did not take the opportunity provided under that statutory provision and institute another lawsuit within thirty days after the stay was lifted by the bankruptcy court. Appellants did not specifically ask the bankruptcy court to annul the bankruptcy stay or retroactively grant relief. Appellants have, instead, chosen to continue a lawsuit that under the clear holdings of the Ninth Circuit, and the great weight of authority, is void.

This court should affirm the superior court's denial of the motion for reconsideration. Appellants waived most of their arguments by not presenting them in their response to appellee's motion to dismiss. This court should affirm the superior court's denial of appellant's motion to amend the complaint because that complaint would have related back to a void document, i.e., a document that had absolutely no legal effect whatsoever.

II. STANDARD OF REVIEW FOR ENTRY OF SUMMARY JUDGMENT

Appellee filed a motion to dismiss arguing that the superior court lacked jurisdiction. In filing its motion, appellees went beyond the boundaries of appellants' complaint by presenting matters of record from the bankruptcy proceeding.

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2. Appellees request that this Court take judicial notice that the clerk's office for the bankruptcy court in United States District Court is located approximately three blocks from the Maricopa County Superior Court at 230 North First Avenue. Appellees further request that the court take Judicial notice of the fact that the bankruptcy clerk's office has a computer terminal that may be used by the public and which allows the public to type in the name of a debtor to determine if the debtor has filed a bankruptcy petition.

See e.g., IR No. 8 at 4. Judge Rogers concluded that the motion pending before him should be characterized as a motion for summary judgment rather than a motion to dismiss. Arizona Rule of Civil Procedure 12(b)(7) states, "If, on a motion asserting the defense numbered 6 to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. . . ." This court reviews the entry of summary judgment to determine if appellees are entitled to Judgment as a matter of law. *See e.g., Orme School v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). The court of appeals should affirm the trial court for any reason that is supported by the record. *See Walter v. Simmons*, 169 Ariz. 229, 241 n.9, 818 P.2d 214, 226 n.9 (App. 1991); *State ex rel. McDougall v. Albrecht*, 168 Ariz. 128, 133, 811 P.2d 791, 796 (App. 1991).

III. THE SUPERIOR COURT LAWSUIT WAS COMPLETELY VOID *AB INITIO*

One of the fundamental provisions of the bankruptcy code is the automatic stay. The statute authorizing a stay states in pertinent part:

> [A] petition filed under section 301, 302, or 303 of this title operates as a stay applicable to all entities of —
>
> (1) The commencement or continuation, including the issuance or employment of process, or judicial, administrative, or other action or proceeding against the debtor that

> was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> * * *
>
> (3) Any act to obtain possession of property of the estate or property from the estate or to exercise control over property of the estate;
>
> * * *
>
> (6) Any act to collect, assess or recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. § 362(8)(1), (3), (6).

The liability insurance of the debtor is an asset of the bankruptcy estate. *In re Titan Energy, Inc.*, 837 F.2d 325, 329 (8th Cir. 1988); *In re Minico Group of Companies, Ltd.*, 799 F.2d 517, 519 (9th Cir. 1986); *A.H. Robbins Co. v. Piccinin*, 788 F.2d 994, 1001 (4th Cir. 1986), *cert. denied*, 479 U.S. 876 (1986). Thus, the automatic stay prohibits any attempts by third parties, such as appellants, to sue and collect the judgment from a debtor's liability policy.

A. The General Effect of a Violation of the Stay

The bankruptcy went into effect when the appellee filed its bankruptcy petition on January 4, 1991. *See Maritime Elec. Co.*

v. United Jersey Bank, 959 F.2d 1194, 1204 (3rd Cir. 1992); *In re Miller*, 22 B.R. 479, 480-81 (D. Md. 1982); *In re Eisenberg*, 7 B.R. 683 (Bankr. E.D.N.Y. 1980); *Miller v. National Franchise Serv.*, 167 Ariz. 403, 406, 807 P.2d 1139, 1142 (App. 1991); *United Northwest Fed. Credit Union v. Arens*, 233 Ran. 514, 664 P.2d 811, 813 (1983); *Gulfco Finance v. McCormick*, 577 So.2d 778, 780 (La. App. 1991). The bankruptcy stay is treated just like any other order of a court. *In re Miller*, 22 B.R. at 480-81. No formal service or notice to appellants was required for the stay to be effective against them. *See Maritime Elec. Co.*, 959 F.2d at 1204; *In re Advent Corp.*, 24 B.R. 612, 614 (Bankr. 1st Cir. 1982); *In re Miller*, 22 B.R. at 480-81; *Arens*, 664 P.2d at 813; *Gulfco Finance*, 577 So.2d at 780. The bankruptcy stay prohibited appellants from filing their lawsuit against appellee. *See Arens*, 664 P.2d at 813 (1983) (filing of foreclosure action in violation of the automatic stay, was without effect, and as if it had never been filed); *Raikes v. Langford*, 701 S.W.2d 142, 144 (Ky. App. 1991).

The record clearly shows that on January 14, 1991, appellants filed their personal injury complaint against appellees in violation of the automatic stay. The law is also clear about the effect of appellants' violation. An act that violates the automatic stay is a *void* act.[3] The clear majority of cases hold that

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3. *Miller v. National Franchise Serv, Inc.*, 167 Ariz. 403, 405, 807 P.2d 1139, 1141 (App. 1991) (if bankruptcy petition filed first, the superior court judgment is void); *see also Kalb v. Feuerstein*, 308 U.S. 433, 438, 60 S.Ct. 343, 346 (1940); *Maritime Elec. Co.*, 959 F.2d at 1206-07 (citing cases); *In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992) (actions taken in violation of the stay are void and not simply voidable); *Ellis v. Consolidated Diesel Elec. Corp.*, 894 F.2d 371, 372 (10th Cir. 1990); *In re 48th Street Steakhouse, Inc.*, 835 F.2d 427, 431 (2d Cir. 1987), *cert. denied sub nom. Rockfeller Group, Inc.*

(Cont'd)

acts in violation of the stay are void. *See Schwartz*, 954 F.2d at 572 (weight of authority says violations are void and citing cases); *Benjamin*, 824 P.2d at 357 (same); *Bailey*, 829 P.2d at 673 (same).

Because appellants' complaint was void, the law treats the complaint as if it has no effect or had never been filed. *Maritime Elec. Co.*, 959 F.2d at 1206-07 (3rd Cir. 1992); *Ellis*, 894 F.2d at 372; *Vahlsing v. Commercial Union Ins. Co.*, 928 F.2d 486, 489 (1st Cir. 1991); *In re Advent Corp.*, 24 B.R. at 614; *In re Garcia*, 109 B.R. at 338; *see also Renoes, Inc. v. PAC Financial Corp.*, 515 N.E.2d 563, 565-66 (Ind. App. 1987) (dismissing appeal because bankruptcy petition had been filed and appeal would have been without effect); *Arens*, 664 P.2d at 813; *Nautical Landings Marina*, 791 S.W.2d at 296. The fact that appellants did not have notice of the stay when they filed their complaint has no

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(Cont'd)

v. 48th Street Steakhouse, 485 U.S. 1935 (1988); *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1308 (11th Cir. 1982); *In re Advent Corp.*, 24 B.R. 612, 614 (Bankr. 1st Cir. 1982) *Spears v. United States*, __ B.R. __, 1992 WL 130923 (N.D. Okla. 1992) (following Ninth Circuit decision in *Schwartz* and rejecting *Sikes* decision); *In re Garcia*, 109 B.R. 335, 338 (N.D. Ill. 1989) (voidable position is insufficient in force of logic or the great weight of authority); *Richard v. City of Chicago*, 80 B.R. 451, 453 (N.D. Ill. 1987); *Renges, Inc. v. PAC Financial Corp.*, 515 N.E.2d 563, 565-66 (Ind. App. 1987) (dismissing appeal because bankruptcy petition had been filed and appeal would have been without effect); *United Northwest Fed. Credit Union v. Arens*, 233 Ran. 514, 664 P.2d 811, 813 (1983); *Raikes v. Langford*, 701 S.W.2d 142, 145 (Ry. 1986); *Gulfco Finance*, 577 So.2d at 780-81; *Benjamin v. Chamberlin*, 113 N.M. 216, 824 P.2d 356, 357-58 (App. 1991) (discussing authorities and concluding that the weight of authority and better reasoned rule was that acts are void); *Bailey v. Campbell*, 829 P.2d 667, 673 (Okra. 1991); *Nautical Landings Marina, Inc. v. First Nat'l Bank*, 791 S.W.d 293, 296 (Text Civ. App. 1990).

bearing on the fact that the complaint is void. *Richard*, 80 B.R. at 454. Holding that a judicial act in violation of the stay is void *ab initio* is consistent with the stay's function of enabling the bankruptcy court to determine whether it will exercise its power. *Maritime Elec. Co.*, 959 F.2d at 1207.

B. This Court Should Follow the Analogous Decisions of the State Courts

1. Raikes v. Langford

In *Raikes v. Langford*, 701 S.W.2d 142 (Ky. App. 1986),[4] the Kentucky Court of Appeals faced almost identical facts to those presented in this case. *Raikes* was a wrongful death action arising out of a shooting. The estate filed a civil lawsuit against Langford on December 19, 1980. Langford had, however, already filed a bankruptcy petition on October 8, 1980.

* * *

4. The *Raikes* decision has more precedential value than simply the decision of the intermediate appellate court in another state. The plaintiff who lost at the intermediate level sought review in the Kentucky Supreme Court. The Kentucky Supreme Court denied reviewed, but ordered that the decision of the Kentucky Court of Appeals be published. Thus, the *Raikes* decision has essentially been approved by the Kentucky Supreme Court.

APPENDIX I — EXCERPTS FROM HEARING ON MAY 11, 1995 BEFORE THE ARIZONA SUPREME COURT

BEFORE THE SUPREME COURT OF ARIZONA

Arizona Supreme Court Case No.

1 CA-CV 92-0117

Maricopa County Superior Court
No. CV 91-00953

DAVID L. STALLINGS and BARBARA J. STALLINGS, husband and wife,

Plaintiffs-Petitioners,

vs.

THE SPRING MEADOWS APARTMENT COMPLEX LIMITED PARTNERSHIP, an Arizona Limited Partnership,

Defendants-Respondents.

CORRECTED PETITION FOR REVIEW

BRYAN CAVE
Mark I. Harrison, Esq./#001226
Stephen G. Montoya, Esq./#011791
2800 N. Central Ave., Ste. 2100
Phoenix, Arizona 85004
(602) 230-7000

Attorneys for Petitioners

* * *

Finally, the bankruptcy court's order neither used the word "annul" nor granted retroactive relief. The order simply provided that the stay was being "lifted" so that the Stallings could "proceed in their personal injury claims against the debtor." The wording suggests that the stay was prospectively terminated, as of the date of the order, for the limited purpose of permitting the Stallings to institute a personal injury action against Spring Meadows.[9]

B. Fifth Circuit Rule on Annulment Rejected

The Stallings urge us to adopt the more liberal rule of annulment espoused by the Fifth Circuit in *Sikes v. Global Marine, Inc.* under circumstances similar to this case. After Global had filed a Chapter 11 bankruptcy petition, the Sikes filed a personal injury lawsuit against Global in a Texas district court. Once the Sikes learned of the bankruptcy court. The bankruptcy court eventually lifted the stay for 32 different causes, including the Sikes, " 'for the limited purpose of allowing the personal injury actions . . . to be commenced against Global, permitting the personal injury actions that are pending against Global to proceed. . . .' " *Id.* at 178. The Fifth Circuit found that this order annulled the stay and validated the Sikes' previously filed complaint. *Id.* at 178-79.

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9. Regardless of the expiration of any statute of limitations, 11 U.S.C. § 108(c) provides creditors with A thirty day grace period after "notice of the termination or expiration" of the stay to file any civil action against the debtor. Accordingly, even though the Arizona statute of limitations had run on their personal injury claim by the time the stay was lifted, section 108(c) provided the Stallings with an additional thirty days from the date the stay was lifted to file a new action against Spring Meadows. However, the Stallings never filed such an action within that time period.

In reaching this conclusion, the Fifth Circuit failed to address the cases holding that a stay should be annulled only in limited circumstances. *Id.* at 179. The court cited a single case, *In re Albany Partners, Ltd.*, 749 F.2d 670 (11th Cir. 1984), as support for its determination that the order annulled the stay. In *Albany Partners*, however, the bankruptcy court annulled the stay because the debtor filed the bankruptcy petition in bad faith and attempted to circumvent its obligations to the creditor. Accordingly, *Albany Partners* does not support annulment of the stay under the circumstances existing either in *Sikes* or in this case.

We are convinced by the reasoning of the decisions that take a more restrictive view of the bankruptcy court's authority to annul a stay. Because annulment essentially extinguishes the stay, we agree that it should be reserved to those circumstances in which a debtor has filed a petition in bad faith or has misused the bankruptcy laws. Furthermore, in this case, the bankruptcy court did not clearly grant, nor the Stallings request, an annulment with retroactive effect. Therefore, we find the court's order prospectively lifted the stay to permit the Stallings to proceed but did not validate the prior-filed complaint.

In light of this finding, we need not address the parties' remaining contentions regarding the extent of jurisdiction vested in the federal district court and whether that jurisdiction precludes subject matter jurisdiction in the superior court.

IV. Denial of the Stallings' Motion to Amend Their Complaint

In their motion to reconsider filed in the superior court, the Stallings also requested leave to file an amended complaint under Rule 15(a), Arizona Rules of Civil Procedure. They now

ask us to reverse the denial of their request so that they may file a new complaint that would relate back to their original complaint pursuant to Rule 15(c), Arizona Rules of Civil Procedure.

The superior court should freely grant leave to amend when the interests of justice will be served, but no automatic right to amend exists. *In re Estate of Torstenson*, 125 Ariz. 373, 376, 609 P.2d 1073, 1076 (App. 1980). A court does not abuse its discretion by denying leave to amend when the amendment would be futile. *Id.*

Here, the superior court's denial of leave to amend was appropriate for two reasons. First, the Stallings did not actually intend to amend their complaint; they asked only for permission to file an identical, third amended complaint. Our procedural rules, however, permit a party to "amend" a pleading; they do not allow a party to simply refile an identical pleading already filed. Ariz. R. Civ. P. 15(a).

Second, the Stallings' attempt to relate an amended complaint back to their original complaint would be futile because we have concluded that the original complaint was void. *Schwartz*, 954 F.2d at 571-72. No valid complaint exists to which a third amended

* * *

APPENDIX J — PARTIAL TRANSCRIPT OF ARIZONA SUPREME COURT HEARING DATED MAY 11, 1996

ARIZONA SUPREME COURT

CV 94-0355-PR

Maricopa County Superior Court
No. CV 91-00953

DAVID L. STALLINGS and BARBARA J. STALLINGS, husband and wife,

Petitioners,

vs

THE SPRING MEADOWS APARTMENT COMPLEX LIMITED PARTNERSHIP, an Arizona Limited Partnership;

Respondent,

PARTIAL TRANSCRIPT OF ARIZONA SUPREME COURT HEARING ON MAY 11, 1996

* * *

[During Respondent Spring Meadow's counsel's argument]

Court: (Chief Justice Stanley Feldman): Let's get one thing out of the way. I just finished testifying in Congress that we were not bound by the Ninth Circuit decisions. Now tell me why I was wrong. Maybe I better write a letter.

. . .

Appendix J

This Court has the only responsibility and only authority to decide questions of state law. But this Court has equal authority with the Ninth Circuit and the United States District Court to decide questions of federal law subject only to revision by the United States Supreme Court. So while we should have all sorts of respect for the Ninth Circuit and do, nothing they hold is binding upon us.

. . .

You mean if, if I look at two decisions interpreting one federal statute, one from the Ninth Circuit and one from the Fourth Circuit, and I think the Fourth Circuit decision is much better reasoned, much more correct, much more clearly carries out the intent of Congress, I can't follow it and I must follow the Ninth Circuit decision even though we feel it's completely wrong?

* * *

APPENDIX K — REPRODUCTION OF PERTINENT PORTIONS OF SPRING MEADOWS RESPONSE TO STALLINGS' PETITION FOR REVIEW MOTION TO CLARIFY

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CV-94-0355-PR

No. 1 CA-CV 92-117

Maricopa County
Superior Court
No. CV 91-00953

DAVID L. STALLINGS, and BARBARA J. STALLINGS, husband and wife,

Plaintiffs,

v.

THE SPRING MEADOWS APARTMENT COMPLEX LIMITED PARTNERSHIP, and Arizona Limited Partnership,

Appellee.

Appendix K

RESPONSE TO PETITION FOR REVIEW

TEILBORG, SANDERS & PARKS, P.C.

By: Richard A. Kent, 006375
Bruce C. Smith, 011721
3030 North Third Street
Suite 1300
Phoenix, Arizona 85012
Attorneys for Respondent

* * *

The Stallings sued Spring Meadows claiming that Spring Meadows was guilty of negligence for an incident that occurred on May 13, 1989. The two-year statute of limitations expired while the bankruptcy stay was still in effect. *See generally* A.R.S. § 12-542 (statute of limitations). However, after Judge Ollason lifted the bankruptcy stay, the Stallings still had until July 25, 1991 to file a valid lawsuit. 11 U.S.C. § 108(e). The Stallings did not take advantage of this statutory provision.

Spring Meadows filed a motion to dismiss in the superior court on August 16, 1991. Petitioners' Appendix Exhibit 9. Spring Meadows pointed out that the superior court lacked subject matter jurisdiction and that the filing of the complaint was a void act because it was in violation of the automatic stay. *Id.* Appellants opposed the motion to dismiss, arguing that the complaint was voidable and that the superior court had subject matter jurisdiction. Respondent's Appendix Exhibit 1. In its reply, Spring Meadows pointed out that the decision of the Arizona Court of Appeals have held that an act done in violation of a bankruptcy stay is void. Respondent's Appendix Exhibit 2.

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The Honorable Alfred J. Rogers ruled on November 22, 1991. Petitioners' Appendix Exhibit 10. The Stallings requested that the superior court reconsider its ruling. *Id.* Exhibit 11. Two days before the Stallings even filed their motion for reconsideration, they filed a second lawsuit against Spring Meadows. *Compare* Respondent's Appendix Exhibit 3 (December 3, 1991 complaint attached to Motion to Dismiss Appeal), *with* Petitioner's Exhibit 11 (December 5, 1991 Motion for Reconsideration).

ARGUMENTS ON WHY REVIEW SHOULD NOT BE GRANTED

This court should deny the Stallings Petition for Review for several reason. First, the decision by the Arizona Court of Appeals is in harmony with the majority of federal and state cases, which hold that acts in violation of a bankruptcy stay are void. Second, the opinion is the only correct interpretation of the bankruptcy record. Any other conclusion will require this court to presume that a sitting bankruptcy judge entered an order that violated established precedents. Finally, the fact that Spring Meadow's insurer is fulfilling its obligation to provide a defense is irrelevant. The issue is whether law recognizes the defense asserted and whether that defense is valid.

I. THE COURT OF APPEALS CORRECTLY RULED THAT ACTS IN VIOLATION OF A BANKRUPTCY STAY ARE VOID *AB INITIO*

The Arizona Court of Appeals ruled that because the Stallings' complaint was void, the law treats the complaint as if it has no effect or had never been filed. Opinion at 8. This ruling

is not a basis for granting the petition because it is consistent with established law.[2]

The Stallings implicitly ask this court to do two things. The Stallings ask the Arizona Supreme Court to overrule a prior decision in which it held that a violation of the bankruptcy stay is a void act. Rather than deal with the issue, the Stallings also want this court to then disregard the Ninth Circuit and Arizona pronouncements on the "void" versus "voidable" debate, and find that their conduct was voidable.

One of the fundamental provisions of the bankruptcy code is the automatic stay. The statute authorizing a stay prohibits people from filing lawsuits, engaging in any act to obtain property of the bankruptcy estate or collecting on a claim against the debtor. 11 U.S.C. § 362(a)(1), (3), (6). The bankruptcy stay went into effect when the Spring Meadows filed its bankruptcy petition on January 4, 1991. *See Maritime Elec. Co.*, 959 F.2d at 1204; *Miller v. National Franchise Serv.*, 167 Ariz. 403, 406, 807 P.2d 1139, 1142 (App. 1991);[3] *Arens*, 664 P.2d at 813. No formal

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2. *See, e.g., Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1206-07 (3rd Cir. 1992); *Ellis v. Consolidated Diesel Elec. Corp.*, 894 F.2d 371, 372 (10th Cir. 1990); *Vahlsing v. Commercial Union Ins. Co.*, 928 F.2d 486, 489 (1st Cir. 1991); *In re Advent Corp.*, 24 B.R. 612, 614 (Bankr. 1st Cir. 1982); *In re Garcia*, 109 B.R. 335, 338 (N.D. Ill. 1989); *Renges, Inc. v. PAC Financial Corp.*, 515 N.E.2d 563, 565-66 (Ind. App. 1987) (dismissing appeal because bankruptcy petition had been filed and appeal would have been without effect); *Northwest Fed. Credit Union v. Arens*, 664 P.2d 811, 813 (Kan. 1983); *Nautical Landings Marina, Inc. v. First Nat'l Bank*, 791 S.W.2d 293, 296 (Tex. Ct. Civ. App. 1990) (dismissing appeal even though bankruptcy court lifted the stay to continue the appeal because appellate bond filed in violation of stay).

3. In his dissent, Judge Toci cites his opinion in *Flexmaster Aluminum*

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service or notice to the Stallings was required for the stay to be effective against them. *See Maritime Elec. Co.*, 959 F.2d at 1204; *In re Advent Corp.*, 24 B.R. 612, 614 (Bankr. 1st Cir. 1982); *Arens*, 664 P.2d at 813. The bankruptcy stay prohibited the Stallings from filing their lawsuit against Spring Meadows. *See Arens*, 664 P.2d at 813 (filing of foreclosure action in violation of the automatic stay, was without effect, and as if it had never been filed); *Raikes v. Langford*, 701 S.W.2d 142, 144 (Ky. Ct. App. 1991) (personal injury lawsuit void).

When the Stallings learned that the lawsuit that they filed violated the bankruptcy stay, they should have known from a review of the pertinent cases that the Arizona courts and the Ninth Circuit would both declare that this lawsuit was void. Five years before the Stallings filed their complaint, this court said, "We hold that a judgment entered in violation of the automatic stay provisions of the Bankruptcy Code is *void as to the debtor in bankruptcy*." *Great Southwest Fire Ins. v. Triple "I" Ins. Serv., Inc.*, 151 Ariz. 283, 286, 727 P.2d 336, 339 (1986), *see also Miller*, 167 Ariz. at 406, 807 P.2d at 1142 (violation of stay is void act). From a legal standpoint, there is no distinction between obtaining a judgment and the filing of a lawsuit. Both are acts against the property of a debtor.

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Awning Co. v. Hirschberg, 173 Ariz. 83, 839 P.3d 1128 (Ariz. Ct. App. 1992). Judge Toci's *Hirschberg* opinion failed to even recognize or distinguish the inconsistency between his statement and the rule of law announced by the supreme court in *Great Southwest Fire Ins. v. Triple "I" Ins. Serv., Inc.*, 151 Ariz. 283, 286, 727 P.2d 336, 339 (1986). Judge Toci's *Hirschberg* opinion relied on a bankruptcy court decision in the Ninth Circuit. Again, Judge Toci failed to cite Ninth Circuit cases that held the contrary. *See, e.g., In re Shamblin*, 890 F.2d 123, 125 (9th Cir. 1984).

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In 1988 and 1989 the Ninth Circuit had said that acts in violation of a bankruptcy stay are void. *In re Shamblin*, 890 F.2d 123, 125 (9th Cir. 1989); *In re Stringer*, 847 F.2d 549, 551 (9th Cir. 1988). Contrary to the Stallings contention in their Petition, in 1991 the law in the Ninth Circuit was clear.

II. THE STALLINGS DID NOT, AND COULD NOT, REQUEST RETROACTIVE RELIEF

In 1991, the law in the Ninth Circuit was clear on what the Stallings needed to do to obtain a retroactive lifting of the bankruptcy stay to annul a void act. The Stallings have never attempted to follow Ninth Circuit law on meeting their burden of proving that exceptional circumstances exist. Thus the court of appeals properly held that the bankruptcy court could not grant retroactive relief.

A. *The Court of Appeals Correctly Interpreted Judge Ollason's Order*

The court of appeals correctly concluded that the Stallings did not request an annulment in addition to a prospective lifting of the stay. Opinion at 10. The Stallings did not tell the bankruptcy court that they were seeking a retroactive annulment from the bankruptcy court under 11 U.S.C. § 362(d). How is a judge supposed to know that appellants were seeking relief under § 362(d) rather than just permission to file a lawsuit, taking advantage of the thirty-day grace period in 11 U.S.C. § 108(c)? If the Stallings wanted specific relief under a statutory provision, they should have cited the statute and argued whey they were entitled to an annulment.

The court of appeals correctly decided that Judge Ollason's

order could not have been a retroactive annulment. The order does not state that retroactive relief is being given. The order did not indicate why retroactive relief was appropriate. The only inference that can be legally drawn from Judge Ollason's order is that he gave the Stallings permission to file a new lawsuit. *Cf. Black v. Industrial Commission*, 83 Ariz. 121, 126, 317 P.2d 553 (1957) (party seeking *nunc pro tunc* order should include a record such that anyone who examines it can determine the nature of the error sought to be corrected and include wording in the order a finding or recital to show that sufficient evidence was presented for entry of a *nunc pro tunc* order) *overruled on other grounds, Estate of Hash v. Henderson*, 109 Ariz. 174, 507 P.2d 99 (1973). The Stallings did not present evidence to the bankruptcy court showing why they were entitled to an annulment.

The decision by the Arizona Court of Appeals must be correct because any other interpretation would require a court to presume that Judge Ollason was acting in violation of Ninth Circuit precedent. This is an improper assumption.

As the court of appeals correctly pointed out on page 10 of its opinion, the Ninth Circuit told the lower courts in 1989 that an annulment of a bankruptcy stay is a remedy only available in exceptional circumstances and is to be used sparingly. *Shamblin*, 890 F.2d at 126; *see also In re Williams*, 124 B.R. 311, 314 (C.D. Cal. 1991).[4] Exceptional circumstances exist when, prior to

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4. The Stallings quote the *Williams* decision on pages 14-15 of their Petition in support of their argument that creditors do not have the burden of proving that exceptional circumstances exist. The Stallings fail to quote the very next paragraph of the *William's* decision. "The power to annul the stay must however, be used sparingly." 124 B.R. at 316. The *Williams* court stated that the burden falls on creditors, such as the Stallings, to prove that the act in

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filing the bankruptcy petition the debtor commits some act of fraud, acts in bad faith, or unreasonably withholds notice of the bankruptcy. *In re Calder*, 907 F.2d 953, 956 (10th Cir. 1990) (debtor's unreasonable behavior before violating stay); *In re Albany Partners*, 749 F.2d 670, 675 (11th Cir. 1984) (relief afforded because debtor acted in bad faith); *Alergan v. Advance Ross Corp.*, 759 F.2d 1421, 1425 (9th Cir. 1985) (misrepresentation of intent to file bankruptcy); 2 *Collier on Bankruptcy* § 362.11, at 362-85 (15th ed. 1994) (annulment allowed in some cases of bad faith).

The Stallings' motion to lift the stay did not show what extraordinary circumstances existed. This was an example of an ordinary violation of the bankruptcy stay. The Stallings did not explain what conduct Spring Meadows had committed that was in bad faith toward them, was fraudulent, or how Spring Meadows unreasonably withheld notice of the bankruptcy proceedings. The Stallings did not make these arguments because there was no basis for them. The Stallings learned about the bankruptcy shortly after they served the complaint. Petitioners' Appendix Exhibit 3. There were no extraordinary circumstances under the Ninth Circuit's 1989 decision in *Shamblin*.

Because there were no extraordinary circumstances, Judge Ollason could not have granted the Stallings a retroactive annulment. To do so would have been in contravention to

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violation of the bankruptcy stay "falls within the narrow exceptions to the rule of voidness." *Id.* at 317. The Stallings' Petition does not contain any argument on how they carried their burden in the bankruptcy court of showing that their situation fell within a narrow exception. Instead, they want to relitigate in Arizona state court what the Ninth Circuit required them to do in federal court.

Shamblin and an abuse of discretion. 890 F.2d at 126. The Arizona courts should presume that other courts are following the law and not violating it. Based on the presumption that Judge Ollason was following Ninth Circuit precedent, the court of appeals correctly held that Judge Ollason did not give the Stallings retroactive relief.

B. *Bankruptcy Court does not Have the Legal Authority to Tell State Courts how to Interpret Its Orders*

Lifting the bankruptcy stay does not change the character of a void act. *Ellis*, 894 F.2d at 374; *In re Randall Enter., Inc.*, 115 B.R. 292 (D. Colo. 1990); *Raikes*, 701 S.W.2d at 145; *Bailey v. Campbell*, 829 P.2d 667, 674 (Okla. 1991); *Nautical Landings Marina*, 791 S.W.2d at 296. Lifting the stay validates only *subsequent* judicial proceedings, but does not validate prior ones. *Ellis*, 894 F.2d at 374; *Bailey v. Campbell*, 829 P.2d at 674; *Nautical Landings Marina*, 791 S.W.2d at 296. Thus, when Judge Ollason lifted the stay he could not, as a matter of law, validate the complaint that appellants filed in superior court.

The Stallings argue that the bankruptcy court's order requires the Arizona courts to conclude that retroactive relief was granted. Petition at 8. The Arizona Court of Appeals was free to make its own interpretation of the order.

If the bankruptcy judge lifts the stay, the bankruptcy court does not have the power to decide the effect that the lift stay will have on the state court lawsuit that was filed in violation of the automatic stay. *Pettibone Corp. v. Easley*, 935 F.2d 120, 123 (7th Cir. 1991); *In re Hudgins*, 102 B.R. 495, 498 (Bankr. E.D. Va. 1989) (lifting bankruptcy stay does not "constitute a *de facto*

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APPENDIX L — REPRODUCTION OF PERTINENT PORTIONS OF 11 U.S.C. §§ 362(a) AND (d)

§ 362. Automatic Stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of —

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

. . .

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

. . .

(d). On request of a party in interest and after notice and a hearing, the court shall grant

relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay —

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of a act against property under subsection (a) of this section, if —

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

APPENDIX M — REPRODUCTION OF PERTINENT PORTIONS OF 11 U.S.C. § 108(c)

§ 108. Extension of Time.

. . .

(c) Except as provided in Section 524 of this title, if applicable non-bankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under § 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay Section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

APPENDIX N — REPRODUCTION OF BANKRUPTCY COURT'S ORDER GRANTING STALLINGS' MOTION FOR CLARIFICATION DATED DECEMBER 6, 1994

Matthew R.K. Waterman
State Bar No. 013124
KORN WATERMAN, P.C.
33 North Stone Avenue
Suite 2121
Tucson, Arizona 85701
(602) 629-9100

Ralph E. Seefeldt
State Bar No. 1746
RALPH E. SEEFELDT, P.C.
110 South Church Avenue
Suite 3360
Tucson, Arizona 85701-3031
(602) 623-5686

Attorneys for Movants

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

Case No. 91-0025-TUC-RTB
(Chapter 11)

In re

SPRING MEADOWS APARTMENT COMPLEX LIMITED PARTNERSHIP, an Arizona limited partnership,

Debtor.

Appendix N

"M" No. 91-706

DAVID L. STALLINGS and BARBARA J. STALLINGS, husband and wife,

Movants,

v.

SPRING MEADOWS APARTMENT COMPLEX LIMITED PARTNERSHIP, an Arizona limited partnership,

Respondent.

ORDER GRANTING MOVANTS' MOTION FOR CLARIFICATION, OR, IN THE ALTERNATIVE, FOR ANNULMENT OF THE AUTOMATIC STAY

This matter having come before the Court on Movants' August 19, 1994 Motion for Clarification, Or, In the Alternative, for Annulment of the Automatic Stay (the "Motion") filed on behalf of Movants David and Barbara Stallings ("Movants"); and the Court having reviewed all of the pleadings, transcripts and affidavits and having heard the arguments of counsel, and having issued Findings of Fact and Conclusions of Law consistent with this Order now grants the Motion.

IT IS THEREFORE ORDERED that consistent with the Findings of Fact and Conclusions of Law herein:

1. The Order of this Court dated June 25, 1991 granted Movants an annulment of the automatic stay for the limited

purpose of providing relief retroactive to and including January 14, 1991, thereby validating Movants' filing of the January 14, 1991 personal injury complaint against the Debtor in Maricopa County Superior Court, styled *Stallings v. the Spring Meadows Apartment Complex Limited Partnership*, Maricopa County Superior Court, No. CV 91-00953, such that said filing was not a void act, as, given the relief granted herein, it was not filed in violation of the automatic stay, and thereby allowing the Movants to proceed with their cause of action in the Superior Court without the necessity of filing a new lawsuit after stay relief was obtained.

2. Additionally, and in the alternative, upon Movants' alternative prayer for relief, this Court now orders that Movants be, and they hereby are, granted an annulment of the automatic stay for the limited purpose of providing relief retroactive to and including January 14, 1991, thereby validating Movants' filing of the January 14, 1991 personal injury complaint against the Debtor in Maricopa County Superior Court, styled *Stallings v. the Spring Meadows Apartment Complex Limited Partnership*, Maricopa County Superior Court, No. CV 91-00953, such that said filing was not a void act, as, given the relief granted herein, it was not filed in violation of the automatic stay.

DATED this __ day of _____, 1994.

DEC-6 1994

s/ Lawrence Ollason
Lawrence Ollason
United States Bankruptcy Judge

APPENDIX O — REPRODUCTION OF PERTINENT PORTIONS OF STALLINGS' MOTION TO CLARIFY OR IN THE ALTERNATIVE, FOR ANNULMENT OF THE AUTOMATIC STAY

Matthew R. K. Waterman
State Bar No. 013124
KORN WATERMAN, P.C.
33 North Stone Avenue
Suite 2121
Tucson, Arizona 85701
(602) 629-9100

Ralph E. Seefeldt
State Bar No. 1746
RALPH E. SEEFELDT, P.C.
110 South Church Avenue
Suite 3360
Tucson, Arizona 85701-3031
(602) 623-5686

Attorneys for Movants

IN THE UNITED STATES BANKRUPTCY COURT
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SPRING MEADOWS APARTMENT COMPLEX LIMITED PARTNERSHIP, an Arizona limited partnership,

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Appendix O

"M" No. 91-706

DAVID L. STALLINGS and BARBARA J. STALLINGS, husband and wife,

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SPRING MEADOWS APARTMENT COMPLEX LIMITED PARTNERSHIP, an Arizona limited partnership,

Respondent.

MOTION FOR CLARIFICATION, OR, IN THE ALTERNATIVE, FOR ANNULMENT OF THE AUTOMATIC STAY

David L. Stallings and Barbara J. Stallings ("Movants"), by and through their attorneys undersigned, hereby make their *Motion for Clarification, Or, In the Alternative, for Annulment of the Automatic Stay*. The purpose of this Motion is to seek clarification from the court as to the meaning of its *Order Re Stallings' Motion for Relief From Automatic Stay* dated June 25, 1991 (the "Order"), which regarded Movants *Motion for Relief From Automatic Stay* dated May 31, 1991 (the "MRS").[1] In the alternative, the purpose of this Motion is to seek an immediate order for annulment.

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1. For the Court's convenience, true and correct copies of the Order and the MRS have been attached hereto as Exhibits "A" and "B" respectively, and are herein incorporated by this reference.

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This Motion is supported by the following Statement of Facts and Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 19 day of August, 1994.

KORN WATERMAN, P.C.
Attorneys for Movants

By: s/ Matthew R.K. Waterman
Matthew R.K. Waterman

STATEMENT OF FACTS

1. On May 13, 1989, a stair on a staircase at the Spring Meadows Apartment Complex (the "Property") broke beneath David Stallings, a tenant there, causing him to fall violently. The step was an unreasonably dangerous condition maintained by Spring Meadows Apartment Complex Limited Partnership, the above-captioned debtor and debtor in possession (the "Debtor") and the owner and operator of the Property. As a result of the fall, Movants suffered substantial and serious damages.

2. On January 14, 1991, Movants filed a personal injury complaint against the Debtor in Maricopa County Superior Court, which was subsequently amended twice, seeking to recover for their damages in a matter styled Stallings v. the Spring Meadows Apartment Complex Limited Partnership, Maricopa County superior Court, No. CV91-00953 (the "Complaint").

3. On February 26, 1991, Movants served the Complaint on

the Debtor, and were first informed of the Debtor's January 4, 1991 (the "Petition Date") Chapter 11 filing.[2]

4. From and after the Petition Date, the Debtor had continued to operate its business and manage its property as a debtor in possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code. As a result, all outward appearances of the Debtor were unchanged, and no indication of the Debtor's status as a Chapter 11 debtor was available to outside parties, including Movants.

5. After learning of the Chapter 11 filing, the MRS was filed on Movants' behalf on May 31, 1991. The MRS sought relief which would permit Movants to continue to pursue their claims, but to collect only from the Debtor's liability insurance policy, with the stay remaining in effect as to any effort to collect from any other party.

6. The MRS clearly disclosed the dates upon which the Complaint had been filed and served, which were clearly subsequent to the Petition Date.

7. No objection to the MRS was ever filed.

8. Debtor's bankruptcy counsel at the time the Order was entered, Jeffrey H. Greenberg, has testified under oath in deposition that

a. he believed that permitting Movants to continue

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2. It is uncontroverted that Movants had no knowledge of the Debtor's Chapter 11 filing at the time they filed the Complaint, or at any time until informed upon service of the Complaint on February 26, 1991.

their suit against the Debtor's insurance carrier was in the best interests of the Debtor and its estate. *See Transcript of Deposition of Jeffrey H. Greenberg* (the "Greenberg Transcript"), attached hereto as Exhibit "C" and incorporated herein by this reference, at page 8, lines 17-21;

b. he was aware of the fact that the MRS was filed subsequent to the Petition Date and therefore in violation of the automatic stay. *See Greenberg Transcript* at page 6, lines 19-25;

c. he spoke to Movants' counsel regarding the MRS and indicated that the Debtor had no objection to the requested relief, and that he expected Movants to continue with their Superior Court case. *See Greenberg Transcript* at page 6, lines 5-18;

d. he believed that a grant of the requested relief permitted Movants to continue with their Superior Court case. *See Greenberg Transcript* at page 7, lines 1-6;

e. he never had any expectation that a grant of the requested relief would have still required Movants to institute a new suit in Superior Court. *See Greenberg Transcript* at page 7, lines 7-20;

f. his response to the MRS would have been the same even if the MRS had used the word "annul" or "retroactive," and that he would still have not objected to the MRS. *See Greenberg Transcript* at page 7, line 21-page 8, line 3; and

g. that he believed that the Order granted Movants the requested relief: the right to continue their Superior Court case. *See Greenberg Transcript* at page 8, lines 13-16.

9. Pursuant to Local Rule of Bankruptcy Procedure 4001(E), a *Certification of No Objection* was filed and a form of order lodged with the Court. The Order was signed by Judge Ollason on June 25, 1991.

10. Movants subsequently requested that the Debtor answer the Complaint. Instead, the Debtor[3] filed a Motion to Dismiss (the "MTD") the personal injury action, arguing (i) that the Bankruptcy Court had original, exclusive jurisdiction and therefore the Superior Court lacked subject matter jurisdiction, and (ii) that the filing of the Complaint was a void act, as it was in violation of the automatic stay.

11. Movants opposed the MTD, arguing (i) that the Superior Court retained jurisdiction, (ii) that the filing of the Complaint was voidable as opposed to void, and, since the Debtor had taken no action to make the voidable act (the filing of the complaint) void, it remained valid, and, (iii) in any case, the Bankruptcy Court had lifted the stay and authorized Movants to proceed with their originally filed lawsuit.

12. The Superior Court treated the MTD as a motion for summary judgement, and granted summary judgement in favor of the Debtor. Movants' Motions for Reconsideration and for Leave to Amend were both denied, and Movants appealed to the Arizona Court of Appeals.

13. The Court of Appeals over a dissent ultimately denied Movants' appeal, finding that (i) the filing of the Complaint was void, not voidable, (ii) the Bankruptcy Court's Order granted

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3. In reality, counsel for the Debtor's liability insurance carrier, Richard A. Kent of Teilborg, Sanders & Parks, P.C.

prospective and not retroactive relief, and did not annul the automatic stay, and (iii) the Superior Court's denial of Movants' Motion for Leave to Amend was not an abuse of discretion. *See Opinion, copy attached as Exhibit D; but see Dissent, Id.*

MEMORANDUM OF POINTS AND AUTHORITIES

Movants have suffered serious and substantial injuries. They have alleged that those injuries resulted from a condition for which the Debtor bears liability. They have sought to have their claims adjudicated in a responsible and proper manner.

The Debtor suffered financial problems, and sought protection from its creditors so that it might reorganize its debts. The automatic stay is one of the primary defenses afforded a debtor to allow it to do so.

Somehow the needs and rights of Movants and the debtor have been ignored, to the detriment of both. It is now possible that movants will be deprived of the opportunity to have their claims determined on the merits, and the Debtor will be deprived of an opportunity to have the amount of claims asserted against the estate substantially reduced.

The automatic stay provided the Debtor with all of the protection from Movants that the Debtor needed. Movants were forced to halt their efforts to proceed to judgement against the Debtor, giving the Debtor an opportunity to examine the facts and come to the realization that, if Movants were willing to proceed only against the Debtor's liability insurance carrier, no harm would befall the Debtor or its estate as a result. In fact, to the extent that Movants' claim would be satisfied by their insurance carrier, the amount of claims against the debtor's estate would be

commensurately reduced, thereby providing a substantial benefit to the estate.

Filing the MRS provided just such an opportunity to the Debtor: Movants requested relief only sufficient to permit them to proceed with their Superior Court suit to judgement, collect only from the insurance carrier, and still have the stay remain in effect with regard to collection from the Debtor.

The Debtor consciously opted not to object to the MRS, fully aware of the fact that pursuant to local rule, the result would be a grant of the requested relief. The Debtor (as well as Movants) believed that relief to be the right to continue the already-filed Superior Court personal injury action. *See Greenberg Transcript* at page 7, lines 1-6.

Although the words "annul" or "retrospective" were never used in the MRS or the Order, the Distinction was irrelevant prior to the Ninth Circuit's decision in *In Re Schwartz*, 954 F.2d 569 (9th Cir. 1992) (holding that violations of the automatic stay are void *ab initio*). If those words had been used, the Debtor still would not have objected. *See Greenberg Transcript* at page 7, lines 21-25.

Had the MRS been filed subsequent to the *Schwartz* decision, it would have sought to "annul" the stay, or requested that the relief be granted "retroactively." But the failure to chant the talismanic words should not be found fatal to Movants' case. Movants clearly disclosed that they had filed the Complaint, inadvertently and unknowingly, subsequent to the Petition Date. They clearly requested relief that would permit them to proceed with their suit. It would have served no purpose to have required Movants to refile a new suit in Superior Court. And the

Bankruptcy Court clearly had the authority to grant relief which would permit Movants to continue their extant case. The Debtor would not have objected to the MRS even if it had used the magic words "annul" and "retrospective."

Most importantly, the Debtor through its counsel at the time has testified under oath to the true intent of the Order: to permit the already filed state lawsuit to proceed as if no technical violation of the stay had occurred.

This intent is now obviously subverted for reasons that probably relate much more to its insurance company's interests than the debtor's. Movants herein seek clarification from the Court that the relief granted by the Order is as they (and the Debtor) understood it at the time: relief from the stay was granted to permit Movants to continue the Superior Court suit that they had already filed (admittedly in unknowing violation of the stay) and disclosed to the Court; now that the words "annul" and "retroactively" have become important, specifying that the previously granted relief annulled the stay, and granted relief retroactively to a time which permitted Movants' act of filing the Complaint to not be a violation of the automatic stay.

Alternatively, Movants request that the Court now grant an annulment of the stay as it relates to the actions of Movants with respect to the filing of the Complaint, thereby retroactively eliminating any violation of the stay which might have, but for the grant of the requested relief, occurred.

WHEREFORE Movants respectfully request that the Court issue an Order either (i) clarifying its June 25, 1991 Order by specifying that such Order provided retroactive relief to Movants and annulled the stay, thereby validating the filing of

Appendix O

Movant's Superior Court Complaint filed on January 14, 1991; or, in the alternative, (ii) granting Movants retroactive relief from the stay in the form of an annulment of the stay, thereby validating the filing of Movant's Superior Court Complaint filed on January 14, 1991.

RESPECTFULLY SUBMITTED this 8 day of August, 1994.

KORN WATERMAN, P.C.
Attorneys for Movants

By: s/ Matthew R.K. Waterman
Matthew R.K. Waterman

APPENDIX P — REPRODUCTION OF PERTINENT PORTIONS OF SPRING MEADOWS RESPONSE TO STALLINGS' MOTION TO CLARIFY

Richard A. Kent, State Bar No. 006375
Bruce C. Smith/State Bar No. 011721
TEILBORG, SANDERS & PARKS, P.C.
3030 North Third Street, Suite 1300
Phoenix, Arizona 85012
(602) 230-5750

Attorneys for Respondent Spring Meadows Apartment Complex

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ARIZONA

No. 91-0025-TUC-RTB
(Chapter 11)

In re

SPRING MEADOWS APARTMENT COMPLEX LIMITED PARTNERSHIP, an Arizona limited partnership,

Debtor.

"M" No. 91-706

DAVID L. STALLINGS and BARBARA J. STALLINGS, husband and wife,

Movants,

v.

SPRING MEADOWS APARTMENT COMPLEX LIMITED PARTNERSHIP, an Arizona limited partnership,

Respondent.

Appendix P

RESPONSE TO MOTION FOR CLARIFICATION, OR, IN THE ALTERNATIVE, FOR ANNULMENT OF THE AUTOMATIC STAY

Spring Meadows Apartment Complex Limited Partnership, requests that the Court deny the Movants' motion for clarification and motion for an annulment of the automatic bankruptcy stay. The motion for clarification or for annulment is not well taken because it is being filed almost three and one-half years after they requested that the stay be lifted. Moreover, the current law in the Ninth Circuit, and the law that

* * *

The movants had several options at their disposal. First, they could have simply refiled another lawsuit in Maricopa County Superior Court. The movants did not take advantage of this opportunity. The movants also did not take advantage of the extension of the statute of limitations afforded to them by 11 U.S.C. § 108(c). This statute states that if the statute of limitations runs during the time in which the bankruptcy stay is in effect, a new lawsuit can be filed within thirty days after the bankruptcy court has lifted the stay. The movants did not take advantage of this opportunity. The law gave the movants an opportunity to redress their claims, but they did not take advantage of it.

III. THE MOVANTS ARE NOT NOW ENTITLED TO AN ANNULMENT.

Movants' current motion for an annulment is just as defective as their initial motion. The movants do not show what exceptional circumstances existed in 1991. They do not claim

that Spring Meadows committed a fraud on them when they filed their initial motion to lift the bankruptcy stay. They do not show what acts of bad faith existed and that prevented them from knowing about the bankruptcy stay. The only thing that the movants are claiming is that they filed the lawsuit and did not know about a bankruptcy stay. This makes this situation an ordinary case and not an exceptional one.

Granting an annulment in every case in which there has been a violation of the automatic stay is wrong because it encourages creditors to act now and seek court approval later. *In re Coleman American Companies, Inc.*, 26 B.R. 825, 831 (Bankr. D. Kan. 1983) (declining to grant retroactive relief). The *Coleman* court stated:

> Such a system would give creditors the impetus to determine, *sua sponte*, if there is "cause" for granting relief. A creditor would examine its position, determine there was cause, essentially "grant" itself relief, act in violation of the stay and at some later date, come into Court asking for a ratification of the acts. Such a course of conduct is improper and abhorrent to the automatic stay of § 362. Furthermore, violations of the automatic stay are subject to punishment by contempt. There are ample means for prompt relief in the Code.... The size of the entity, *innocence of intent*, or difficulty in halting the wheels in motion *are not excuses for or exceptions from automatic stay violations*.

26 B.R. at 831 (emphasis added).

Appendix P

The Arizona bankruptcy courts cannot have a system whereby creditors grant themselves relief in state court actions and then subsequently seek ratification for their invalid acts before the bankruptcy courts.

Under the law in the Ninth Circuit, there is no basis for this Court to find grounds for an annulment. Therefore, Spring Meadows requests that the Court deny the movants' motion for an annulment.

IV. THE MOVANTS HAVE A REMEDY AVAILABLE TO THEM.

The movants' dilemma is not uncommon. In *Raikes*, the Kentucky Court of Appeals faced an identical situation. The bankruptcy court was aware of a lawsuit that had been filed in violation of the automatic stay, the stay was lifted, and the state court ruled that the lawsuit was without any legal effect. 701 S.W.2d at 144.

The Sixth Circuit reached the same decision in *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905 (6th Cir. 1993). There, a bankruptcy stay was in effect when the plaintiffs filed their products liability claim in the state court. The bankruptcy court lifted its initial stay after the corporate reorganization plan went into effect and the stay was dissolved. The bankruptcy court then retroactively annulled the lift stay. The Seventh Circuit found that the bankruptcy court did not have jurisdiction to retroactively annul the stay. The court said that violation of the bankruptcy stay could be voided only if there was fraudulent concealment of the bankruptcy or prejudice to the plaintiff. The Sixth Circuit found that the plaintiffs were not prejudiced because they were notified of the stay when they served the

complaint. Even though the plaintiffs lost their cause of action because the statute of limitations had run, the Sixth Circuit found that the plaintiffs had an additional thirty days to file a lawsuit under § 108(c), but chose not to refile their lawsuit. Just as there were no exceptional circumstances in *Easley* or *Raikes*, there are none here.

If the movants are entitled to any relief, they can obtain it by filing a lawsuit against John Osborne. The movants have

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